(1) 95-1591
No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LEON NEUFELD,

Petitioner,

vs.

CITY OF BALTIMORE; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; BOARD OF MUNICIPAL AND ZONING APPEALS OF BALTIMORE CITY; ROBERT E. SMITH, as Director of the Office of Communications and Cable of the City of Baltimore,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED

1. Did the courts below fail to appreciate and thus unconstitutionally apply this Court's prior First Amendment rulings setting forth principles guaranteeing citizens, including Petitioner, their constitutional civil rights to receive protected disseminated speech, press, and expression of desired sources and content at their home and in their abode emanating from broadcast facilities, including worldwide treaty protected satellites, when they applied an inappropriate, rigid, overly restrictive view of applicable state and federal law as to "aesthetics" as a substantial governmental interest under *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 to the residential non-commercial use and placement of receive-only satellite antennae on Petitioner's residence at the only usable site and denying him thereby his right to receive desired satellite broadcast expression and directly contrary to state law below.

2. Did the Court of Appeals err in affirming the trial court decision, granting summary judgment against Petitioner when it found the City's zoning ordinance was facilely content neutral to be analyzed as a time, place, and manner regulation under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48, and *Turner Broadcasting Sys., Inc. v. F.C.C.*, __ U.S. __, 114 S. Ct. 2445, under the facts presented, since even the trial court noted the zoning amendments and restrictions were adopted "apparently in connection with the sale of a cable television franchise" and its approved program content in contrast to the desired content of satellite programs available to Petitioner's residential satellite antennae?

3. Did the Court of Appeals err in affirming the trial court upon the basis that adequate alternative avenues of communication were available as a wide variety to Neufeld under

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47, through his purchase of the City's franchised cable television limited service to only obtain 30 basic program limited channels and up to 7 premium channels the content of which is chosen by the cable company as opposed to Petitioner's choice of program content of all the satellite broadcast channels available from throughout the world including those few provided by cable under the facts presented and no content is shown of them?

4. Did the Court of Appeals also err in affirming and finding such alternative avenues of communication available by placement behind the 30 foot setback and removal of obstructive trees on his and adjoining properties because for First Amendment purposes its inquiry is not concerned with economic impact, even if proven economically unfeasible, under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54, as commercial distribution claim, rather than a citizen's residential claims of the right to receive chosen speech and press in his home as supported by Congress, the F.C.C. rules and decisions of this Court?

5. Did Petitioner lack standing, under the facts presented, to present claims under 42 U.S.C. §§ 1983, 1988 as held by the trial court and affirmed by the Court of Appeals?

LIST OF PARTIES TO THE PROCEEDINGS UNDER RULE 14.1(b) AND ENTITLES UNDER RULE 29.1

All parties to the proceedings below in the United States Court of Appeals for the Fourth Circuit as well as the District Court appear in the caption of the case and are the only interested parties.

There are no parties which are public corporations having publicly traded stocks, nor parent, subsidiary or affiliate corporations to list pursuant to Rule 29.1.

Respondent City of Baltimore and the entity entitled Mayor and City Council of Baltimore City is a municipal corporation under the laws of the State of Maryland and capable of suing and being sued in his own name.

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Petitioner Leon Neufeld respectfully prays that a Writ of Certiorari be issued to review the *per curiam unpublished* judgment and opinion of the United States Court of Appeals for the Fourth Circuit issued in the above proceeding December 5, 1995.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals affirming the decision of the District Court of which review is sought, entered December 5, 1995, is unpublished and is reproduced in the Appendix as Appendix A. The Court of Appeals Order entered January 2, 1996 (Appendix B) denying the petition for rehearing and suggestion for rehearing *en banc* is not reported.

The initial District Court Opinion declaring the provisions of Baltimore City Ordinance No. 266 amendment of Article 30, Baltimore City Zoning Code partially preempted as to Antenna size and facilely invalid only as to regulation of satellite antennae size and denying civil rights claims entered January 29, 1993 is published at 820 F. Supp. 963 and at Appendix I. The second District Court Opinion declaring preempted additional portions of Ordinance 266 as to roof mounting and certain lot line distances in the rear yard but refusing to decide the issues related to denials of the requested conditional use and special exception permits entered April 2, 1994, is published at 863 F. Supp. 255 and at Appendix G the third District Court Opinion denying all further claims entered on October 24, 1994 is unpublished and set out as Appendix D.

The decision of the Board of Municipal and Zoning Appeals is unreported and set out at Appendix J.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on December 5, 1995 (App. A). The petition for rehearing and suggestion for rehearing *en banc* was denied January 2, 1996 (App. B). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and Supreme Court Rule 13. Jurisdiction in the Court of Appeals was invoked under 28 U.S.C. § 1291. Jurisdiction in the District Court was invoked under 28 U.S.C. §§ 1331, 1343(a)(3) and (4); 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983, 1988. The decisions below are final.

CONSTITUTION, F.C.C. RULE, AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the First and Fourteenth Amendments, F.C.C. Rule, 47 C.F.R. § 25.104 and Baltimore City Code Provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

A Writ of Certiorari is requested in this case to allow this Court to review the Court of Appeals opinion affirming the District Court decisions denying relief pursuant to 42 U.S.C. §§ 1983, 1988 and declaratory and injunctive relief and full enforcement of preemption under F.C.C. Rule codified as 47 C.F.R. § 25.104. A summary of the background facts and proceedings follows.

Leon Neufeld resides in an individual home in Baltimore City that, prior to March, 1984, utilized a roof mounted small television antennae. His home was zoned "R-1, Residence District" and he was entitled to the listed "use regulations" under Section 4.1-1. He also was entitled to seek "a conditional use" and "special exception" to erect it in the required front yard and

its size through a Board of Municipal and Zoning Appeals application and hearing, under the existing zoning law, to lawfully erect a freestanding television antennae. This would have allowed his freestanding antennae. He was denied the only statute permitted right to erect his antennae by the Board of Municipal and Zoning Appeals which held contrary to Neufeld's evidence that the satellite antennae "would menace and endanger the public health, security, and general welfare". This is the reason allowed "standards for conditional uses" in the law at that time. However, there was no mention in the zoning code of a satellite antennae for a residence unless it could fit within the "television antennae" category, and if so the front yard by "conditional use" or "special exception" could also be reduced in such process to 15 feet depth.

The zoning code at that time did permit other conditional uses, in Neufeld's R-1 Residence Zone, for "antennae Towers and Micro-Wave relay towers and installation for communications transmissions or receiving (Section 4.1-1.c.10) but only by public utilities" and allowed less front yard setbacks for many residence classifications. Thus a differential treatment of antennae in the basic zoning ordinance existed.

Neufeld's lot was in hilly terrain with large trees having trunks 24 inches in diameter or greater, growing all over his one-half acre lot, which trees were also 60 to 70 feet in height. In addition, in the direction of the broadcasting satellites, he would have to aim his antennae over an adjoining lot and also across the road and over City property. Both properties were similarly heavily forested with similar size trees barring reception from his rooftop and grounds at setback. However, where the Neufeld driveway allowed an opening through the trees the adjoining property and City property also had a treeless roadway which permitted reception of satellite broadcasts. It necessitated placement about 25 feet back from the edge of the front road.

Such conditions were within the standards for issuing conditional uses and special exceptions and reducing the required 30 foot front yard.

While Petitioner applied for the requested "conditional use" permit, the City introduced an ordinance to amend the zoning ordinance specifically to apply only to satellite antennae placement use and sizing together with a companion related ordinance to create a cable television system for the City. After the Board's denial of a "conditional use" and a "special exception" to retain Neufeld's antennae at his home under Ordinance 266 he had no right to have the satellite antennae as a freestanding antennae anywhere on his residence much less the existing 5 feet into the required front yard. The factual basis for rejecting approval at any location on Neufeld's residence was because "The Board feels that *the antennae is unsightly and too large and should not be allowed.*"

During the interim, the F.C.C. issued its partial preemption order codified as 47 C.F.R., § 25.104. From that time until the trials were conducted against Neufeld, its terms concerning preemption were applicable to the old law and the amended law.

Then Neufeld was convicted of the criminal zoning violation for refusal to remove the prohibited satellite antennae. This was followed by 10 additional criminal citations and convictions where the maximum $100 daily fine was imposed. Facing daily additional criminal charges for the antennae notwithstanding the preemption order, he removed his satellite antennae following the last conviction on September 25, 1986.

In the interim period the City had also contracted with United Cable for a cable television franchise under the companion ordinance in which United Cable paid the City $1,100,000 and $250,000, City costs, reimbursement fees, and

other future renewal fees as well as free City channels and broadcast facility use. In addition, all the cable company charges made and collected would include five percent billings to customers for new City taxes.

At about the same time, on January 23, 1985, prior to the criminal charges and removal of Neufeld's antennae, the City also enacted the zoning amendment No. 266. It differentially allowed 12 foot diameter antennae for a great many uses in the R-1 District that were not single family homes, like Neufeld's. It specifically allowed taverns to have them regardless of lot size. The restrictions assured that the only parties in R-1 Residence Districts that could now erect and use effective satellite antennas were educational, religious, fraternal and nursing home facilities, hotels, motels, and bars, etc. Under these provisions, Neufeld's single family home would be required to connect to the new cable television system of the City when it became wired for such service while a next door tavern or motel didn't.

Neufeld filed his complaint here under 42 U.S.C. §§ 1983, 1988 with affidavit and supporting exhibits on May 29, 1987. No responsive answer, pleading or denials were ever filed then or even now by any defendant against any claims in the complaint. Default was entered. Respondents, while under order of default, however, filed a Motion to Dismiss, July 6, 1987.

No ruling having been made or hearing conducted by the court on the Rule 12 Motion to Dismiss for nearly two years, Petitioner on March 1, 1989 then filed a Motion for Partial Summary Judgment on preemption issues and the civil rights constitutional issues and for declaratory and injunctive relief supported by "Undisputed Facts" and Neufeld's "Affidavit". Respondents on April 26, 1989 merely filed a "Responsive Memorandum," in the form of a legal brief against entry of

Summary Judgment without oath and without disputing any facts.

No hearing was held on the Motion for Partial Summary Judgment.

Over a year later on October 3, 1991, Judge Herbert Murray entered an unreported memorandum opinion, finding that abstention and dismissal was appropriate under *Burford*.

That decision was appealed to the Court of Appeals here. That court reversed Judge Murray's abstention decision, 964 F.2d 347 (1992).

Judge Murray then rendered three separate decisions only upon some of the various claims Neufeld presented but only as to the invalidity of the new Ordinance No. 266 amendment and not upon the basic ordinance, or upon the application of those provisions to Neufeld compelling removal. Judge Murray held that Neufeld lacked "standing" to complain that the zoning law as applied and in its threatened application to him was unconstitutional and the wrongful denial of speech reception actionable under 42 U.S.C. §§ 1983, 1988.

The Court of Appeals affirmed concluding that the zoning provisions were not facilely content based and, without factual support, that the City's licensed cable franchise offered adequate alternative avenues of communication in television broadcast as did the rear of the property as an erection site by removal of obstructing trees. None of these issues were claimed at trial by Respondents and no findings of fact supporting them were made by the trial court. Respondents have yet to file even an Answer to the Complaint, any affidavit, or even an assertion in the trial court that the zoning law was content neutral and that alternative avenues for such speech reception was adequate and available,

especially since the City approved cable programming content assertion itself would produce content based animus here.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT DECISION IN THIS CASE UPHOLDING THE DISTRICT COURT DECISIONS, UPON THE BASIS THAT THE ZONING PROVISIONS ARE FACIALLY CONTENT NEUTRAL CAUSING A LACK OF STANDING FOR NEUFELD TO CONTEST THEIR APPLICATION AND FINDING ADEQUATE ALTERNATIVE AVENUES FOR SUCH SPEECH PROGRAMMING AVAILABLE TO PETITIONER IN RESPONDENTS' APPROVED LICENSEE PROGRAMMING IN PLACE OF HIS DESIRED SPEECH CONTENT VIA LARGE SELECTION FREE SATELLITE BROADCASTS RECEIVABLE AT HIS HOME ON HIS ANTENNAE CONCERNS THE DENIAL OF A LICENSE TO RECEIVE DESIRED SPEECH AND CONFLICTS WITH THE PROVISIONS AND INTENT OF THE F.C.C. RULE AND APPLICABLE PROVISIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS AND THE APPELLATE COURTS OF MARYLAND UPON RELEVANT ISSUES.

A. The Court of Appeals decision, upholding the trial court decision, upon the basis that aesthetics alone was sufficient grounds upon which to affirm the District Court ruling without any evidence or consideration of state law to the contrary is contrary to this Court's decisions including *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789; *Berman v. Parker*, 348 U.S. 26; *City of Renton v. Playtime*

Theaters, 475 U.S. 41; and *United States v. O'Brien,* 391 U.S. 367, and *the Maryland appellate decision thereon.*

B. Dismissal, and rejection of Neufeld's standing to present these civil rights claims based upon First and Fourteen Amendment freedom from prior restraint of the right to receive speech, was error.

The Respondents have never filed an answer or responsive pleading or presented any argument to the trial court disputing the allegations set out in the complaint; the original motion for partial summary judgment; the submission of undisputed facts and affidavit in support; or the Petitioner's subsequent motion for partial summary judgment on remaining issues. They also conceded these facts in the joint proposed Pre-Trial Order. Neufeld had their constitutional right to ignore the invalidity imposed zoning permit requirements for "conditional use" and "special exceptions" and continue his speech activities. *Shuttlesworth v. Birmingham,* 394 U.S. 147; *Freedman v. Maryland,* 380 U.S. 51.

Under the provisions of Federal Rule of Civil Procedure, Rule 8, this failure to deny the averments of the complaint, the undisputed facts or to oppose requests of summary judgment, these facts and averments are admitted by all Respondents. With such admission it was error for the Court of Appeals to affirm and the trial court to refuse to determine these well pleaded federal civil rights claims.

It is fundamental that a complaint should not be dismissed upon grounds of standing under these facts unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim of a justifiable issue which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Hishon v. King & Spaulding,* 467 U.S. 69; *American National Bank & Trust*

Co. v. Haroco, Inc., 473 U.S. 606. This includes the exhibits annexed to the complaint and the plaintiff's response if any below. *Golden v. Belden*, 754 F.2d 1059 (2nd Cir. 1985). Furthermore, the factual allegations of the complaint as stated including past and threatened prosecutions must be presumed true and liberally construed in favor of plaintiff. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506 (D.C. Cir. 1984); and plaintiff is entitled to all favorable inferences which may be drawn from those allegations. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Given Respondents' Motion to Dismiss without their answers, all of the factual allegations in Petitioner's Complaint without denial must be deemed true. *See, e.g., Hishon v. King & Spaulding*, 467 U.S. 69, 104 S. Ct. 2229 (1984). That is, that no relief could be granted under any set of facts that could be proven consistent with the allegations, *Hishon, supra. See Conley v. Gibson*, 355 U.S. 41, 45-46, 78. *American National Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 105 S. Ct. 3291.

This Court has specifically held that in order to state a claim under 42 U.S.C. § 1983 there are two and only two essential elements which must be alleged. The Court in *Gomez v. Toledo*, 466 U.S. 635, 100 S. Ct. 1920 specifically determined them to be (1) someone caused a deprivation of a federal right, and (2) it was done by one under color of state law. This was a reaffirmation of the principle first enunciated in *Monroe v. Pape*, 364 U.S. 167, 18 S. Ct. 473. The plaintiff is also on similarly firm ground even if the claim be one of procedural due process deprivations, *Board of Regents v. Roth*, 408 U.S. 54, 92 S. Ct. 2710, loss of such First Amendment rights even for a short period is irreparable injury, *Elrod v. Burns*, 427 U.S. 347.

As a result of the prosecutions and threats of daily charges, the event of the September 25, 1986, the Petitioner disconnected

his satellite dish antennae and removed it. The removal was done in a short period and he has had no satellite antennae television reception since then.

Prior to the trials and even prior to the filing of charges on the offenses of March 17, 1986 through April 24, 1986, the Federal Communications Commission, after a nine month notice of proposed rulemaking, on January 14, 1986, adopted a Final Report and Order which was published in the Federal Register in Vol. 51, No. 31, February 14, 1986, and codified under 47 C.F.R. § 27.104.

That Ruling and Order set out the following F.C.C. Rule it had adopted.

> State and *local zoning* or other regulations *that differentiate between satellite receive-only antennas and other types of antennae facilities* are *preempted unless* such regulations (a) have a reasonable and clearly defined health, safety or aesthetic objective; and (b) *do not operate to impose unreasonable limitations on, or prevent, reception* of satellite delivered signals by receive-only antennas *or to impose costs on the users* of such antennas *that are excessive in light of the purchase and installation costs of the equipment.*
>
> Regulation of satellite transmitting antennas is preempted in the same manner except that State and local health and safety regulation is not preempted.

(Emphasis added).

Additionally the F.C.C. followed this with an Order (App. L) compelling local communities to comply with both aspects of 47 C.F.R. § 25.104 stating "thus aesthetics alone are insufficient to justify a discriminatory ordinance that operates as a ban or *unreasonable* limitation on satellite antennae construction."

Thus the Petitioner, was subject to the protection, afforded under that F.C.C. Rule with respect to his antennae and its placement. This Court has held that the F.C.C. has been given broad authority with unified jurisdiction and regulatory authority over all forms of electrical communication. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 47 U.S.C. § 1151, *et seq.*

As claimed, the costs alone to Petitioner, of the large amount of tree removal required, in order to locate the antennae on the rear yard, "are excessive in light of the purchase and installation cost of equipment," and the inadequate permissible site location "operates to impose unreasonable limitations on or prevent reception of satellite delivered signals by receive only antennas" of Petitioner. In addition, these zoning regulations do "differentiate between satellite receive only antennas and other types of antennae facilities" by permitting erection of other resident district antennas in front yards and all antennas of numerous other uses in R-1 Districts of any size and only differentiates as to satellite antennas.

Without any articulated justification and factual support, this ordinance cannot be deemed a proper time, place, or manner regulation of speech activity under *United States v. O'Brien*, 391 U.S. 367.

As the Supreme Court stated in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 52 U.S.L.W. 4803, 4808 (1984):

> . . . if the F.C.C. has resolved to preempt an area of . . . regulation and if this determination of "represents a reasonable accommodation of conflicting policies that are within the agency's domain, we must conclude that all conflicting States regulations have been precluded."
>
> * * *
>
> . . . And, as we have repeatedly explained, when Federal officials determine, as the F.C.C. has here, that restrictive regulations of a particular area is not in the public interest, "states are not permitted to use their police power to enact such a regulation."

Baltimore City, which has determined to limit or prevent issuing "special exception" and "conditional use" permits for any installation at an adequate location of satellite dish antennae installations, should also realize the implementation of such mandated permits will impermissibly infringe upon the First Amendment rights of Petitioner and other residents. *See Red Lion Broadcasting Co. v. F.C.C.*, 396 U.S. 367 (1969); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

Neufeld's right to install and operate a usable satellite dish antennae is protected by the First Amendment of the United States Constitution. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

Zoning ordinances that expressly or effectively prevent homeowners from installing and operating usable satellite dish antennas infringe upon these rights. Such ordinances will not survive judicial scrutiny:

> . . . [T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment.

Schad v. Borough of Mt. Ephraim, supra, 452 U.S. at 77 (Blackmun concurring).

It must be remembered that home satellite antennas can receive a variety of programming that cannot be obtained from any other source. The fact that some satellite programming may be received by an alternative means, such as by subscribing to the Baltimore City cable television systems, will not validate an unconstitutional prohibition of access through the use of dish antennas. *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748, 757 n. 15 (1976); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 518 n. 24 (1981).

Similarly, courts have held that zoning restrictions may not be justified by a desire to control or eliminate commercial competition. *Cord Meyer Development Co. v. Bill Bay Drugs, Inc.*, 229 N.E. 2d 44 (N.Y. 1967); *Swain v. County of Winnebago*, 250 N.E. 2d 439 (Ill. App. 1969) ("it is not the function of the county zoning ordinances to provide economic protection for existing businesses"). In the Communication Satellite Act of 1962, Pub. L. No. 87-624, S. 102(a), 76 Stat. 419 (1962), 47 U.S.C. § 701, *et seq.*, Congress states: "the policy of the United States is to establish . . . as expeditiously as is practicable, a Commercial Communications Satellite System, as part of an improved global communications network which will be responsible to the public needs and national objectives, which will service the communication needs of the United States and other countries and which will contribute to world peace and understanding."

With this in mind, the courts have frequently found that the federal interest is paramount and that local regulation, inconsistent with the Federal interests is preempted. (*See New York State Commission v. F.C.C.*, 669 F.2d 58 (N.Y. 1982); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624).

C. The rulings below were also in conflict with federal law, rulings, and decisions of this Court as to where the authority lies to regulate electrical (broadcast) communication and facilities of reception.

In this appeal, Neufeld claims the refusal of the District Court by Judge Murray to hear and determine these First Amendment civil rights claims and the affirmance on appeal is reversible error. *Steffel v. Thompson*, 415 U.S. 452. In addition, he asserts that the original zoning law and its application to him, to deny the requested and permitted "conditional use", and "conditional use" permit without the necessary zoning justification and a showing of alternative avenues for such speech by the City was error under *United States v. O'Brien*, 391 U.S. 367; *Capital Cities Cable v. Crisp*, 467 U.S. 691; *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61; *Renton v. American Mini Theaters*, 475 U.S. 41 and *Va. Pharm. Bd. v. Va. Citizens Consum. Council*, 425 U.S. 748, and invalid for inadequate standards and procedural safeguards in issuing or denying government permission for speech exercise under *FW/PBS v. Dallas*, 493 U.S. 215.

Neufeld also claims error by the District Court in not going further and rendering decision as to total preemption under the underlying zoning law, and also of it after the amending ordinance was included, as well as after the amendment portions were struck down.

He claims that he presented sufficient undenied proof of

such claims that this Court should not only reverse the decision below, but also to direct the entry of appropriate judgments upon the undisputed facts as to the constitutional claims and also order a trial upon damages.

The Court of Appeals overlooked or misapprehended the fact that the City Zoning Board of Appeal had no factual support for their ruling denying the placement as a special exception, conditional use or by variance based upon the Board's unsupported finding stating the "dish was unsightly and too large and should not be allowed" and, because of this, entered its ruling that "*the dish would menace and endanger the public health, security, and general welfare*". That was the only permitted ruling on the aesthetic findings by the zoning code and Maryland law although it was actually based upon antennae size and appearance only since it did not menace or endanger anything.

The Court of Appeals also apparently overlooked or misapplied the Maryland law totally rejecting the use of "aesthetics" as a sole basis for denying a zoning use on a property when that court relied only upon contrary federal decisions as to aesthetics servicing a substantial government interest. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789.

Maryland decisions also specifically hold that the use of aesthetics as the justification and consideration of the Zoning Board of Appeals here are invalid. The requested "conditional use" or "special exception" is actually part of the comprehensive zoning plan sharing the presumption that, as such, they are in the public interest and of the general welfare and valid. *Rockville Fuel and Feed Co. v. Bd. of Appr. of City of Gaithersburg*, 262 A.2d 499. Further that if the facts and evidence reveal *no additional adverse effect associated with such a special exception use*, irrespective of its location within the zone, it must

be approved unless there is real detriment to the neighborhood. *Schultz v. Pritts*, 432 A.2d 1319; *Turner v. Hammond*, 270 Md. 41, 310 A.2d 543. "Preference by a majority of the neighbors is without legal effect in zoning matters. *Quinn v. Co. Comm'rs of Kent Co.*, 20 Md. App. 413, 316 A.2d 535. *See also, Mossburg v. Montgomery County*, 666 A.2d 1253 (1995) extensively setting out relevant Maryland law.

This Court in apparently misapprehending or overlooking the above Maryland law and the facts below also failed to note or apply Maryland law which also holds an "Ordinance which has as its sole purpose the achievement of an aesthetically pleasing result is not permissible use of police power, although aesthetic goals *may legitimately serve as an additional legislative purpose if health morals, or safety or other ends generally associated with the concept of public welfare are being served." Mayor & City Council of Baltimore v. Mano-Swartz*, 79 A.2d 828. Thus the Court of Appeals holding to the contrary is in conflict with state law principles on which it based its decision; therefore, the decision is actually in conflict with *Renton; Members of the City Council of Los Angeles; United States v. O'Brien, supra*, thus these restrictions are substantially greater than essential to the furtherance of any valid interest under *Renton* and *O'Brien*. In cases such as here where the issues presented are "aesthetics versus the right of free speech", the right of free speech is an important protected activity and should not be restricted for the purpose of aesthetics, *Berman v. Parker*, 348 U.S. 26, 33.

In an overview the Court also misapprehended the fact that the Board of Municipal and Zoning Appeals was presented with a proper comprehensive plan zoning request by Neufeld, as provided for in PART A, Section 4.0-1b and as incorporated in PART B, Section 4.1-1c through standards and procedures in Section 11.0-3c as specifically including "1. Accessory radio and *television antennas when* freestanding or when they extend

higher than 12 feet above the building on which they are mounted" under the old law. This preceded new Ordinance 266 which was the zoning law concentrated upon by Judge Murray and the Court of Appeals. Since the City's Appeals Board *felt* that the satellite antennae was "unsightly and too large and should not be allowed" under the old law it differentiated between regular television antennas and the satellite antennae based upon size and appearance characteristics. This triggered the F.C.C. preemption both as to the old and new law requiring substantial justifications.

Similarly when Judge Murray, by his first memorandum opinion and order of January 29, 1993, ruled that the differential treatment of intervening Ordinance 266 between antennas involved the F.C.C. preemption rule he was not at liberty to select out a size differential of the new ordinance and thereby fail to rule upon the differential treatment under the underlying basic law of the front yard antennae placement when both were at issue in Neufeld's complaint. Judge Murray wrongfully ruled that is made "*no difference*" whether the zoning law validly applied to Neufeld's antennae because of the setback provisions. It was the very applications and threatened further applications of these provisions to the size and shape of the satellite antennae under the basic law as being unsightly when the State recognized the allowance of the zoning request as a matter of right which implicated the F.C.C. Rule in the first place.

When Judge Murray subsequently rendered his next opinion and order on April 14, 1994 relaying again only on the face of the law amending new Ordinance 266, finding a "lack of standing" he simply refused to rule upon the First Amendment receipt of speech claims presented, not because of available alternative cable programming (which would not have been accurate even then because the building of the system only started as a companion ordinance with the restrictive satellite antennae

zoning ordinance) but as to provisions of new Ordinance 266. In fact Judge Murray even spoke in his opinion of the City sale of the Cable franchise as being enacted in connection with enacting the new ordinance "which imposed *stricter limitations* on the placement and size of satellite dishes within the city." Thus it was error for the Court of Appeals to make unsupported factual findings to simply affirm the trial court on a basis not at issue or voted under state law.

He was rejected by the City because of the size and shape of the satellite antennae under the base zoning ordinance based upon invalid size and shape criteria for such decisions for such locations under Maryland law. The Board deemed the size, shape, and unsightliness to be justification to hold that the antennae "would menace and endanger the public health, security, and general welfare" without any evidence to support it. This was error and federal decisions from other Circuits are also to the contrary. *See Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994). The court below's reliance on *Johnson v. City of Pleasanton*, 982 F.2d 350 (9th Cir. 1992) is misplaced. There the evidence showed that a shorter acceptable antennae or its placement in the rear yard was available and adequate satellite broadcast reception would be achieved. No such reception at allowed sites is available to Neufeld. Thus the denial here of any usable location is not within the ruling of *Johnson*. *See also, Cawley v. City of Port Jervis*, 753 F. Supp. 128; *Bodony v. Village of Sand Point*, 681 F. Supp. 1009 (E.D.N.Y. 1987); *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024 (D.N.J. 1988); *Olsen v. City of Baltimore*, 582 A.2d 1225 (based upon the same Ordinance amendment).

CONCLUSION

Based upon the foregoing factual matters, argument, federal rules, and authorities and a review of the decisions below with applicable controlling law and decisions of this Court and Maryland appellate courts as applicable to Petitioner's constitutional and substantive issues presented, Petitioner respectfully requests this Court grant the Writ and either summarily reverse the judgments of denial and dismissal below and determine the constitutional validity of Neufeld's substantiated constitutional claims or order briefing and hearing upon the merits.

Respectfully submitted,

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APPENDIX A — UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED DECEMBER 5, 1995

UNPUBLISHED

Case No. 94-2577

LEON NEUFELD

Plaintiff-Appellant

v.

CITY OF BALTIMORE; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; BOARD OF MUNICIPAL AND ZONING APPEALS OF BALTIMORE CITY; ROBERT E. SMITH, as Director of the Office of Communications and Cable of the City of Baltimore

Defendants-Appellees

Appeal from the United States District Court for the District of Maryland at Baltimore; Herbert F. Murray, Senior District Judge; (CA-87-1383-HM)

Decided December 5, 1995
Before; RUSSELL, WILKENS, and WILLIAMS. Circuit Judges

Affirmed by unpublished per curiam opinion

OPINION

Appendix A

PER CURIAM:

Leon Neufeld appeals decisions of the district court granting summary judgment against him in this action challenging the constitutionality of Baltimore city ordinances regulating the placement of a satellite dish on his residential property. We conclude that baltimore, Md., City Code Art. 30 Sect. 4.0-2(b)(1), 4.1-2(b)(1) (1983), providing for a 30-foot setback line in the front yard of single-family detached dwellings zoned R-1, does not impermissibly infringe upon Neufeld's First Amendment rights. Accordingly, we affirm the judgment of the district court.

I.

On March 31, 1984, Neufeld installed a ten-foot wide satellite dish within 30 feet of the road in the front yard of his Baltimore, Maryland home. Soon afterward, Baltimore zoning officials notified him that the satellite dish as installed violated city zoning ordinances requiring approval for freestanding satellite dishes, see Baltimore, Md., City Code art. 30, Sect. 4.1-1(c)(1), 11.0-3(c) (1983), and providing for a 30-foot front yard setback line, see id Sect. 4.0-2(b)(1), 4.1-2(b)(1). Neufeld unsuccessfully appealed the notice of violation. He also sought a conditional-use permit and a special exception that would have allowed him to maintain the dish in his front yard. Despite the refusal of city zoning officials to grant him a permit or special exception and the subsequent denials of his appeals from these decisions. Neufeld refused to remove the satellite dish. Thereafter, Neufeld was convicted on 11 occasions for violations of the zoning ordinances relating to satellite dishes and fined a total of $1,100. Threatened with continuing prosecution, Neufeld eventually dismantled the satellite dish in September 1986.

Appendix A

In May 1987, Neufeld filed this action pursuant to 42 U.S.C.A. Sect. 1983 (West 1994) against the City of Baltimore and others,[1] claiming that various provisions of the city zoning ordinances regulating the placement of satellite dishes violated his First and Fourteenth Amendment rights and were preempted by a Federal Communications Commission (FCC) regulation. The district court granted the City's motion for summary judgment on Neufeld's constitutional claims,[2] holding that the 30-foot front yard setback provision was "facially neutral and constitutionally unassailable," that Neufeld lacked standing to raise the remaining constitutional challenges, and that Neufeld was not a prevailing party entitled to attorney's fees pursuant to 42 U.S.C.A., Sect. 1988(b) (West 1994), *Neufeld v. City of Baltimore*, 820 F. Supp. 963, 969 (D. Md. 1993); *Neufeld v. City of Baltimore*, 863 F. Supp. 255 (D. Md. 1994). From these decisions, Neufeld appeals.[3]

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1. Neufeld named as other defendants the Mayor and City Council of Baltimore, the Board of Municipal and Zoning Appeals of the City of Baltimore, and Robert E. Smith, Director of the Office of Communications and Cable for the City of Baltimore. For ease of reference we refer to the defendants collectively as "the City."

2. The district court initially dismissed the complaint, reasoning that it should abstain from hearing Neufeld's claims, See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). On appeal, this court reversed the district court, finding that Burford abstention was inappropriate, and remanded for further proceedings. *Neufeld v. City of Baltimore*, 964 F.2d 347, 351 (4th Cir. 1992).

3. The Court granted Neufeld's motion for summary judgment on his claim that certain provisions governing the placement of satellite dishes enacted in Baltimore Ordinance 266 were preempted by an FCC regulation, 47 C.F.R. Sect. 25-101 (1994), because these provisions discriminated between satellite dishes and other types of antennas and did not amount to a reasonable limitation on the former, Neufeld, 863 F. Supp. at 259-60; Neufeld, 820 F. Supp. at 968-69. The City did not appeal from this ruling.

Appendix A

II.

Neufeld first asserts that the 30-foot front yard setback provision imposes an unconstitutional burden of his First Amendment right to receive information. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (holding First Amendment protects public's right to receive "suitable access" to ideas via broadcasts). We cannot agree.

The 30-foot front yard setback requirement is content-neutral. Section 4.1-2(b)(1) requires at least a 30-foot front yard, and section 4.0-2(b)(1) provides that "[a]ll required yards shall be unobstructed from ground level to the sky-except as allowed in section 2.0-8(m)." Baltimore, Md., City Code art. 30, Sect. 4.0-2(b)(1), 4.1-2(b)(1). Section 2.0-8(m) provides that "except for the specified projections and obstructions listed below, every part of the required yard or other required open space shall be open and unobstructed to the sky." Baltimore, Md., City Code art. 30, Sect. 2.0-8(m) (1983). This ordinance lists such objects as arbors, fences of certain heights, lawn furniture, trees, and porches as items that may be located in required yards. There simply is no argument that the 30-foot front yard setback provision is "justified [by] reference to the content of the regulated speech." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); see also *Turner Broadcasting Sys., Inc v. FCC*, 114 S. Ct. 2445, 2459 (1994) ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.").

Analyzed as a content-neutral time, place, and manner regulation, the 30-foot front yard setback provision is

constitutional "so long as [it is] designed to serve a substantial government interest and do[es] not unreasonably limit alternative avenues of communication." *City of Renton*, 475 U.S. at 47. The City's avowed purpose for the setback provision is to further its efforts to maintain open and uncluttered spaces for aesthetic purposes and to promote general welfare. See Baltimore, Md., City Code art. 30, pmbl. (1983). Enhancing aesthetic characteristics of a city is a substantial government interest. See Members of the *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Johnson v. City of Pleasanton*, 982 F.2d 350, 353 (9th Cir. 1992) (upholding constitutionality of height, screening, and setback requirements for satellite dishes as reasonable time, place, and manner restrictions; "[t]he Ordinance serves the substantial governmental interest in public safety and aesthetic values").

And, the City reasonably could have believed that a 30-foot front yard setback for single-family detached dwellings in R-1 districts would enhance the aesthetic value of baltimore. Cf. *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995) (government meets its burden or justifying an ordinance if it shows "the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would [serve] a substantial governmental interest").

Further, adequate alternative avenues of communication are available. First, after allowing for the 30-foot front yard setback, ample square footage remains on which a satellite dish could be placed. See Baltimore, Md., City Code art. 30, Sect. 4.1-2(a)(1) (1983) (setting minimum lot size for single-family dwellings at 7,300 square feet.)[4] Second, Neufeld's affidavit establishes the

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4. Neufeld's affidavit establishes that a satellite dish could be located on other portions of his property, but he wished to avoid the cost of removing the (Cont'd)

availability of cable television service providing 30 basic channels and up to seven premium channels. Thus, a wide variety of television programming is available.

In sum, the 30-foot setback provision is a content-neutral time, place, and manner restriction that serves a substantial governmental interest and provides adequate alternative avenues for communication. As such, the front yard setback provision does not violate Neufeld's First Amendment rights.[5]

AFFIRMED

(Cont'd)
trees that would be necessary. See *City of Renton*, 475 U.S. at 54 (Court rejected the argument that alternative avenues of communication were unavailable because the areas where adult theaters could locate under the zoning ordinance would prove economically unfeasible: "The inquiry for First Amendment purposes is not concerned with economic impact.") (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring)).

5. We conclude that our decision that the 30-foot front yard setback provision is a constitutional content-neutral, time, place, and manner restriction is dispositive of this appeal. Although some portions of his pleadings and brief are couched in broader terms, Neufeld has asserted emphatically that he seeks a declaration only that it was, and is, appropriate for him to place his satellite dish in the same location it was when he was ordered to remove it. Having held that the 30-foot front yard setback provision is constitutional, thereby resolving that the placement of Neufeld's satellite dish at that location was and is prohibited, we need not address his remaining claims that the requirement to obtain a conditional-use permit for certain satellite dishes constitutes an unconstitutional prior restraint on protected speech, and that the differences in the way satellite dishes may be used by schools, motels, etc., as compared with single family dwellings violate the Equal Protection Clause. See *Ashwander v. Tennessee Vally Auth.*, 297 U.S. 288, 341 (1936) (Brandeis J. concurring).

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JANUARY 2, 1996

NO. 94-2577
CA-87-1383-HM

LEON NEUFELD

Plaintiff-Appellant

v.

CITY OF BALTIMORE; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; BOARD OF MUNICIPAL AND ZONING APPEALS OF BALTIMORE CITY; ROBERT E. SMITH, as Director of the Office of Communications and Cable of the City of Baltimore; all of the above in their official capacities and their successors in title

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc and a motion for leave to file the petition out of time.

No member of the Court requested a poll on the suggestion for rehearing in banc.

The Court grants the motion for leave to file the petition out of time and denies the petition for rehearing with suggestion for rehearing in banc.

Appendix B

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED OCTOBER 24, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
CIVIL NO. HM-87-1383

LEON NEUFELD - Plaintiff

v.

CITY OF BALTIMORE, et al. - Defendants

ORDER

In accordance with the forgoing Memorandum, it is this *29th* day of September, 1994, by the United States District Court for the District of Maryland.

ORDERED:

(1) that Neufeld's motion for summary judgment as to whether Neufeld's satellite dish at its original location did not violate the setback ordinance be, and the same hereby is, *Denied:*

(2) that the Clerk of the Court shall *Close* this case; and

(3) that the Clerk of the Court shall mail a copy of this order with the accompanying Memorandum to all of the parties.

Herbert F. Murray
Senior United States District Judge

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED OCTOBER 24, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
CIVIL NO. HM-87-1383

LEON NEUFELD - Plaintiff

v.

CITY OF BALTIMORE, et al. - Defendants

MEMORANDUM

The plaintiff, Leon Neufeld, erected a solid, ten-feetwide receive-only satellite dish in his front yard. Thereafter, the plaintiff's satellite dish was found to violate the thirty feet front yard setback provision and an ordinance requiring a special permit to install the dish. Neufeld instituted the present suit after receiving eleven criminal convictions for these violations. In *Neufeld v. City of Baltimore,* 833 F. Supp. 963 (D.Md 1993), this Court held that Ordinance 266, as to the size restrictions for satellite dishes, was preempted by regulations of the Federal Communications Commission ("FCC"). In a Memorandum and Order dated April 14, 1994, this Court granted in part and denied in part defendants' motion for summary judgment. This Court held that Neufeld did not have standing to bring any claims relating to his criminal violations because he violated the neutral setback provision. In addition, this Court granted in part and denied in part plaintiff's motion for summary judgment; and denied plaintiff's motion for reconsideration. This Court held that 47 C.F.R. Section 25.104 preempted the Baltimore City Zoning Code as it related to the placement of satellite dishes in

residential areas. Therefore, this Court granted plaintiff's request for declaratory judgment as it related to the placement of satellite dishes and will issue an injunction enjoining the enforcement of that ordinance in the future. Lastly, this Court ordered the parties to submit a supplemental brief on the issue of whether Neufeld's satellite dish, at its original location, did not violate the setback ordinance pursuant to Md. Real Property Code Ann. Section 2-114 (1988). After receiving the supplemental briefs from both parties, this Court is now ready to rule.

Neufeld first argues that he acquired the property through a deed. He now contends that, pursuant to Md. Real Property Code Ann. Section 2-114 (1988),[1] his front lot line extends to the center of the front roadway. Unless otherwise specifically

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1. Section 2-114(a) and (b) provide that:

> (a) *In general* Except as otherwise provided, any deed, will, or other instrument that grants land binding on any street or highway as 1 or more of the lines thereof, shall be construed to pass to the devisee, donee, or grantee of all the right, title, and interest of the devisor, donor, or grantor . . . in the street or highway for that portion on which it binds.
>
> (b) *Property on opposite sides of street* — If the transferor owns other land on the opposite side of the street or highway, the deed, will, or other instrument shall be construed to pass the right, title, and interest in the transferor only to the center of that portion of the street or highway upon which the 2 or more tracts coextensively bind.

Md. Real Property Cone Ann. Section 2-114 (a), (b) (1988).

allowed, the zoning regulations for the R-1 district, where Neufeld resides, require a setback of thirty feet of unobstructed yards from the ground level to the sky from the front lot line. Baltimore City, Md., Code art. 30, Section 4.0-2b, 4.1-2b. The front line is measured from the beginning of the front roadway. Since Neufeld installed the satellite dish fifty-five feet from the beginning of the roadway, not the middle, plaintiff now argues that the satellite dish at its original location did not violate the setback ordinance. Neufeld thus wants this Court to allow him to place his satellite dish at its original location.

Without looking at the intricacies of property law, this Court finds that this argument has no merit. This Court already held that Neufeld did not have standing to challenge his convictions under the satellite dish ordinance, because his satellite dish independently violated the setback ordinance. Now Neufeld questions the propriety of the Board of Municipal and Zoning Appeals of Baltimore City's ("the Board") decision as to the appropriate setback on his property. Neufeld never raised this argument before the Board. In addition, Neufeld does not argue that the Board applied their standards in a discriminatory manner as to his property. This Court is not the appropriate forum for this contention. Accordingly, this Court will deny Neufeld's motion for summary judgment as to whether Neufeld's satellite dish as its original location did not violate the setback ordinance.[2]

The Court will enter a separate order in accordance with the foregoing Memorandum.

Herbert F. Murray
Senior United States District Judge

Dated: September *29th*, 1994

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2. With this ruling, all of the issues in the present case have been resolved.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED AUGUST 9, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
CIVIL NO. HM-87-1383

LEON NEUFELD - Plaintiff

v.

CITY OF BALTIMORE, et al. - Defendants

ORDER

In a Memorandum and Order dated April 14, 1994, this Court directed the defendants to file an oppisition to plaintiff's supplemental brief on the issue of whether plaintiff's satellite dish, at its original location, violates the setback ordinace pursuant to Md. Real Property Code Ann. Section 2-114 (1988). This brief was to be submitted to this Court on or before May 16, 1994. As to the present date, no opposition has been received.

Therefore, pursuant to Fed. R. Civ. P. 11(c) and the inherent powers of this Court, it is this *3rd* day of August, 1994, by the United States District Court for the District of Maryland

ORDERED:

(1) that the defendants, witnin ten (10) days from the date of this Order, either file a response to plaintiff's supplemental brief or show cause why sanctions should not be imposed for failing to comply with this Court's Order:

Appendix E

(2) that in the event the defendants file an opposition, plaintiff shall have eleven (11) days from the date of such opposition to file a reply; and

(3) that the Clerk of this Court shall mail a copy of this Order to all of the parties.

Herbert F. Murray
Senior United States district Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED APRIL 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
CIVIL NO. HM-87-1383

LEON NEUFELD - Plaintiff

v.

CITY OF BALTIMORE, et al. - Defendants

ORDER

In accordance with the foregoing Memorandum, it is this *14th* day of April, 1994, by the time United States District Court for the District of Maryland,

ORDERED:

(1) that the motion of the defendants for summary judgment

be, and the same hereby is, *granted in part* and *Denied in part* as follows:

(a) *Granted* as to plaintiff's request for a declaratory judgment that:

(i) the satellite dish zoning ordinance at issue is unconstitutional on any ground as applied to him; and (ii) that the plaintiff was deprived of his rights under the laws and Constitution of the United States;

Appendix F

(b) *Granted* as to plaintiff's request that he is entitled to an injunction and to restitution by the defendants of all fines paid by him; and

(c) *Granted* as to plaintiff's claims under 42 U.S.C. Section 1983 on the issue of liability and on the issue of attorney's fees under 42 U.S.C. Section 1988.

(2) that the motion of the plaintiff for reconsideration be, and the same hereby is, *Denied;*

(3) that the motion of the plaintiff for summary judgment on the remaining issues be, and the same hereby is, *Granted in Part* and *Denied in Part;*

(4) that the plaintiff be, and the same hereby is, *Entitled* to the following declaration:

> As a result, this Court finds that 47 C.F.R. Section 25.104, a regulation of the Federal Communications Commission, preempts Ordinance 266 to the extent that it requires individuals living in residential (R1) districts to install free-standing satellite antennas within 5 feet from any lot line and 10 feet from the nearest window or door of principal use and mounted satellite dishes of solid or mesh constructions to be installed in the front or rear half of the roof.

(5) that the defendants be, and the same hereby are, *Enjoined* from enforcing the Baltimore City Zoning Code to prevent individuals living in residential (R-1) districts from

installing satellite receive-only antennas in accordance with the Court's Memorandum and Order;

(6) that on May 2, 1994, the plaintiff shall submit to this Court a supplemental brief on the issue of whether his satellite dish, at its original location, did not violate the setback ordinance pursuant to Md. Real Property Code Ann. Section 2-114 (1988); that the defendant shall submit an opposition to plaintiff's brief on May 16, 1994; and that the plaintiff can file a reply on May 25, 1994; and

(7) that the Clerk of the Court shall mail a copy of this Order with the accompanying Memorandum to all of the parties.

Herbert F. Murray
Senior United States District Judge

APPENDIX G — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED APRIL 15, 1994 REPORTED 863 F. SUPP. 255

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
CIVIL NO. HM-87-1383

LEON NEUFELD- Plaintiff

v.

CITY OF BALTIMORE, et al.- Defendants

MEMORANDUM

The plaintiff, Leon Neufeld, erected a solid, ten-feetwide receive-only satellite dish in his front yard. Thereafter, the plaintiff's satellite dish was found to violate the thirty feet front yard setback provision and an ordinance requiring a special permit to install the dish. Neufeld instituted the present suit after receiving eleven criminal convictions for these violations. In *Neufeld v. City of Baltimore*, 833 F. Supp. 963 (D.Md. 1993), this Court held that Ordinance 266, as to the size restrictions for satellite dishes, was preempted by regulations of the Federal Communications Commission ("FCC"). Presently before this Court is defendants' motion for summary judgment, plaintiff's motion for reconsideration and plaintiff's motion for summary judgment on the remaining issues.

I. FACTUAL BACKGROUND

Neufeld resides in a single family residence (designated as R-1 district) in Baltimore City ("the city"). On March 31, 1984,

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Neufeld installed a satellite dish on a pole, fifty-five feet in front of his house. At that time, the erection of a satellite dish qualified as a "conditional use" in need of a special permit authorized by the Board of Municipal and Zoning Appeals of Baltimore City ("the Board"). *See* Baltimore City, Md., Code art. 30, Section 4.1-1c (1983). In addition, the zoning regulations for the R-1 district require, unless specifically allowed, a setback of thirty feet of unobstructed yards from the ground level to the sky from the front lot line. *Id.* at Section 4.0-2b, 4.1-2b. On April 11, 1984, Neufeld received a "Notice of Zoning Violation" for installing a satellite antenna within the setback provision without the required permit. Subsequently, Neufeld requested a variance from this zoning violation to the Board. However, this request was denied. He appealed this decision but the Circuit Court of Baltimore City affirmed it. Neufeld did not dismantle his dish and on October 8, 1985, the City fild criminal charges against him for violating the zoning ordinances. He was convicted and fined $100.00. After ten more convictions, Neufeld dismantled his dish and filed the instant suit.

Later that year, the City enacted Ordinance 266 which imposed an even more restrictive set of regulations upon the size, height, and placement of satellite dish antennas. Ordinance 266 limits satellite dishes to 4 feet in diameter if of solid construction, as plaintiff's and 6 feet in diameter if constructed of mesh or wire. *Id.* at Section 4.1-1b.1a (supp. 1993). The size limitation is six feet for accessory free standing satellite dishes constructed of mesh or wire screen. *Id.* at Section 4.1-b.1b (Supp. 1993). However, the Ordinance allows for radio and other non-satellite television antenna of any size as "accessory uses" up to twelve feet above the building they are mounted on. *Id.* at 4.1-1b.1 (Supp. 1993).

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In *Neufeld*, 820 F. Supp. at 963, this Court denied defendants' motion to dismiss and granted in part and denied in part, plaintiff's motion for partial summary judgment. This Court held that:

> [b]ased on the reasoning in *Olsen*[v. City of Baltimore, 321 Md. 324 (1990), this Court concludes that Neufeld lacks standing to challenge his convictions under the satellite dish zoning ordinance, because his satellite dish independently violated the setback ordinance. Therefore, this Court will deny the motion of the plaintiff for partial summary judgment (1) on the request for a declaratory judgment (a) that the satellite dish zoning ordinance at issue was unconstitutional on any ground as applied to him, (b) that the defendants deprived him of his rights under the laws and Constitution of the United States, and (c) that he may install his satellite dish in his front yard; (2) on his request for an injunction ordering restitution by the defendants of all fines paid by him; and (3) on his request for summary judgment on his claims under 42 U.S.C. Section 1983 on the issue of liability.
>
> In sum, whether or not the satellite dish antenna zoning ordinance, before or after amendment in January 1985, validly applied to the satellite dish in the plaintiff's front yard makes no difference. Neufeld's antenna violated the setback ordinance, Section 4.1-

> 2b, and therefore the Board could require Neufeld to dismantle it without depriving him of any of his civil rights. Of course, in the absence of liability under Section 1983, this Court may not award attorneys' fees under Section 1988. *See Hanrahan v. Hampton*, 446 U.S. 754, 756 (1980) ("[t]he statute . . . permits the award of fees only to a 'prevailing party' ").

Id. at 968

This decision had the effect of precluding all of Neufeld's claims except the one requesting declaratory judgment that the zoning ordinance is unconstitutional on its face. As this claim, this Court held that Ordinance 266, to the extent that it prevented individuals living in residential (R-1) districts from installing satellite receive-only antennas between eight and twelve feet in diameter, it imposed an unreasonable limitation on, or prevented, reception of satellite delivered signals by satellite receive-only antennas. Therefore, this ordinance was preempted by 47 C.F.R. Section 25.104, a regulation of the FCC.

II. MOTION TO RECONSIDER

Plaintiff contends that the Court erred in ruling on the preemption issue without deciding whether Ordinance 266 contained a reasonable and clearly defined health, safety, or aesthetic objective. Ordinances which differentiate between satellite receive-only antennas and other types of antennas are preempted by FCC regulations unless such regulations have a reasonable health, safety, and aesthetic objective *and* they do not impose an unreasonable limitation or cost to the user. 47 C.F.R.

Section 25.104 (1986). Both criteria must be met in order to avoid preemption of a zoning regulation that differentiates between satellite receive-only antennas and other types of antennas. the second criterion was not met since this Court found that Ordinance 266 imposed an unreasonable limitation as to the reception if the size was restricted to less than eight foot wide satellite dish antenna. It was therefore unnecessary for this Court to review whether the ordinance had a reasonable objective.

This Court finds no merit in the remainder of Neufeld's arguments in support of this motion, since they are, in essence, the same arguments made by him in his motion for partial summary judgment. The Court will therefore not depart from or otherwise amend any of its prior rulings.

III. MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment should be granted only if there is "no genuine issue as to any material fact, and . . . the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Summary judgment should be granted only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts. *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F2d 390, 394 (4th Cir. 1950). Nevertheless, a "mere scintilla of evidence" in favor of the non-moving party will not suffice to raise a genuine issue of material fact. *Anderson*, 477 U.S. at 252. For the purpose of deciding a motion for summary judgment, this Court must construe all facts and reasonable inferences in favor of the non-moving party on each count. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986; *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 595 (4th Cir. 1985).

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Defendants' motion for summary judgment[1] seeks to close the instant case as a result of this Court's decision in *neufeld*, 820 F. Supp. at 963. Defendants argue that all the issues in the complaint were resolved by this decision. Although this Court held that Neufeld does not have standing to bring any claims relating to his criminal violations because he violated the neutral setback provision, this Court will address plaintiff's claims related to his request for declaratory judgment that Baltimore City's zoning ordinance affecting satellite dishes is unconstitutional of its face.[2]

In his opposition, plaintiff advances the following arguments. First, Neufeld argues that the statute is unconstitutional on its face and preempted by federal regulation because it differentiates as to size, construction, and placement of satellite dishes and other types of antennas.[10] In addition, he

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1. Neufeld has also filed a motion for summary judgment on the remaining issues. He advances the same arguments in this motion as the ones stated in his opposition to defendants' motion for summary judgment. As a practical matter, the following discussion will dispose of both of these motions.

2. As a result, this Court will reject plaintiff's argument and deny his motion for summary judgment as to the following claims:

(a) that this Court failed to decide whether the denial of a special permit was reasonable;

(b) that the Court failed to decide the constitutional challenge as applied to the plaintiff; and

(c) that the Court erred in denying attorneys fees pursuant to 42 U.S.C. Section 1988.

10. This Court's prior ruling already addressed the issue of the size

(Cont'd)

contends that FCC regulations preempt the setback ordinance as it applies to satellite dishes, since setback ordinances vary among the various zoning districts. Plaintiff now raises the issue that his lot extends to the center of the fifty foot wide front roadway. As a result, Neufeld alleges that his satellite dish, at it original site, would have been within the thirty feet setback provision. This Court will address each argument in turn.

As to the placement of satellite dishes, zoning regulations state that "all required yards shall be unobstructed from ground level to the sky, except as allowed in Section 2.08m." Baltimore City, Md., Code art 30, Section 4.0-2b (1983). Local zoning ordinance 4.1-2b.1 regulates the erection of structures on the front lawn of R-1 property. *Id.* at Section 4.1-2b.1. The front yard setback provision for the R-1 district is 30 feet. *Id.* Any Solid satellite dish less than 4 feet in diameter or any mesh or wire screen satellite antenna less than 6 feet in diameter has to be attached to the rear half of the roof of the principal building at least five feet beyond the center line of the roof. *Id.* at Section 4.1-1b.1a (Supp. 1993). Any other mounted satellite dish constructed of solid or mesh material has to be installed on the front half of the roof, or on the rear half of the roof less than 5 feet beyond the center line. *Id.* at Section 4.1-1c.1.1c (Supp. 1993). The new bulk regulations state that satellite free-standing antennas[3] shall be situated no less than 5 feet from any lot line and

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(Cont'd)
restrictions on satellite dishes. In addition, plaintiff did not discuss the differentiation as to the height requirements for satellite antennas. Therefore, this Court will not address these issue.

3. Although not specifically stated in the regulation, this section is only applicable to free-standing antennas since they are the only ones that do not have other specific placement restrictions in other sections of the zoning regulations.

and not less than 10 feet from the nearest door or window of a principal use in the rear yard only. *Id.* Section 2.0-8m. 14A (Supp. 1993). No other type of antenna is so regulated.

The FCC regulation relevant to this case provides:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

47 C.F.R. Section 25.104 (1986).

In the present case, Ordinance 266 contains specific limitations on location and apply solely to satellite receiveonly antennas. These restrictions place a heavy burden on owners of satellite dishes by extremely limiting the placement of the satellite dish which in turn directly affects the reception of signals. As a result, the ordinance must satisfy both subsections of the FCC regulation to avoid preemption.

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Most district courts have held that unless the local government explicitly states the reasons in regulating the installation of satellite antennas, these regulations will be preempted. *Cawley v. City of Port Jervis*, 753 F. Supp. 128, 131-32 (S.D.N.Y. 1990): *Village of Elm Grove v. Py, et al.*, 724 F.Supp. 612, 614 (E.D.Wis. 1989); *Kessler v. Town of Niskayuna*, 774 F.Supp. 711, 715 (N.D.N.Y. 1991); *but see Van Meter v. Township of Maplewood*, 696 F. Supp. 1024, 1029 (D.N.J. 1988). Ordinance 266 does not explicitly set forth a health safety, or aesthetic objective. Defendants have failed to submit any evidence or raise any arguments addressing this issue. In fact, defendants failed to submit an opposition to plaintiffs' motion of summary judgment on remaining issues or reply to plaintiff's opposition to the motion for summary judgment. Since the ordinance failed to meet the first criteria, it is preempted by FCC regulations. As a result, this Court finds that 47 C.F.R. Section 25.104 preempts Ordinance 266 to the extent that it requires free standing satellite antennas to be placed within 5 feet from any lot line and 10 feet from the nearest window or door of principal use and mounted satellite dishes of solid or mesh constructions to be installed in the front or rear half of the roof.[4]

Plaintiff also argues that Ordinance 266 discriminates between the size of mounted and free standing satellite dishes constructed of solid or mesh material. This Court's ruling in *Neufeld*, 820 F. Supp. at 969, had the effect of enjoining defendants from preventing individuals in residential districts from installing satellite receive-only antennas, of any construction or material, between eight and twelve feet in diameter. As a result of this ruling, this claim is moot.

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4. Of course, this ruling does not affect any other setback provision.

Neufeld also contends that since each district has a different setback ordinance, this differentiation has the effect of discriminating against satellite dish's owners between each district. This Court find that this argument has no merit. Zoning by its definition is "the division of a city or town by legislative regulation into districts and the prescription and application in each district of regulation having to do with structural and architectural designs . . . and . . . use [of] buildings." Black's Law Dictionary 1618 (2nd ed. 1985) (citing *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717 726). To argue that all setback ordinances have to be the same in relation to satellite dishes is absurd.

Finally, plaintiff argues that the satellite dish at its original location did not violate the setback ordinance. He now contends that, pursuant to Md. Real Property Code Ann. Section 2-114 (1988),[5] his front lot line extends to the center of the front

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5. Section 2-114(a) and (b) provide that:

> (a) *In general*— Except as otherwise provided, any deed, will, or other instrument that grants land binding on any street or highway as 1 or more of the lines thereof, shall be construed to pass to the devisee, donee, or grantee of all the right, title, and interest of the devisor, donor, or grantor . . . in the street or highway for that portion on which it binds.
>
> (b) *Property on opposite sides of street*— If the transferor owns other land on the opposite side of the street or highway, the deed, will, or other instrument shall be construed to pass the right, title, and interest in the transferor only to the center of that portion of the street or highway upon which the 2 or more tracts coextensively bind.

Md. Real Property Code Ann. Section 2-114 (a), (b) (1988).

roadway. Defendants have also failed to address this issue. This Court finds that further briefing on this issue is needed before a ruling can be made. At the present time, a hearing is not necessary. However, the parties shall submit supplemental briefs on this issue in accordance with the schedule set forth in the accompanying Order.

IV. CONCLUSION

For the reasons stated herein, this Court will grant in part and deny in part defendant's motion for summary judgment. Accordingly, Neufeld does not have standing to bring any claims relating to his criminal violations because he violated the neutral setback provision. In addition, this Court will grant in part and deny in part plaintiff's motion for summary judgment; and deny plaintiff's motion for reconsideration. 47 C.F.R. Section 25.104 preempts the Baltimore City Zoning code as it relates to the placement of satellite dishes in residential areas. Therefore, this Court will grant plaintiff's request for declaratory judgment as it relates to the placement of satellite dishes and will issue an injunction enjoining the enforcement of that ordinance in the future. This Court will enter a separate Order in accordance with the foregoing memorandum.

Herbert F. Murray
Senior United States District Judge

Dated April 14, 1994

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED JANUARY 29, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
CIVIL NO. HM-87-1383

LEON NEUFELD- Plaintiff

v.

CITY OF BALTIMORE, et al.- Defendants

ORDER

In accordance with the Memorandum issued on this date in the above-captioned case, it is this *29th* day of January, 1993, by the United States District Court for the District of Maryland

ORDERED:

(1) that the motion of the defendants, City of Baltimore, Mayor and City Council of the City of Baltimore, Board of Municipal and Zoning Appeals of Baltimore City, and Robert E. Smith, to dismiss be, and the same hereby is, *Denied*;

(2) that the motion of the plaintiff, Leon Neufeld, for partial summary judgment be, and the same hereby is, *Granted in Part* and *Denied in Part*;

(3) that the plaintiff be, and the same hereby is, *Entitled* to the following declaration:

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To the extent that it prevents individuals living in residential (R-1) districts from installing satellite receive-only antennas between eight and twelve feet in diameter, the Baltimore City Zoning Code imposes an unreasonable limitation on, or prevents, reception of satellite delivered signals by satellite receive-only antennas, and thus is preempted by 47 C.F.R. Section 25.104, a regulations of the Federal Communications Commission.

(4) that the defendants, the City of Baltimore, the Mayor and City Council of the City of Baltimore, the Board of Municipal; and Zoning Appeals of Baltimore City, and Robert E. Smith, Director of the Office of Communication and Cable of the City of Baltimore, be, and the same hereby are, *Enjoined* from enforcing the Baltimore City Zoning code to prevent individuals living in residential (R-1) districts from installing satellite receive-only antennas between eight and twelve feet in diameter; and

(5) that the Clerk of the Court shall mail a copy of this Order with the accompanying Memorandum to all of the parties.

Herbert F. Murray
Senior United States District Judge

APPENDIX I — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED JANAURY 29, 1993 REPORTED AT 820 F. SUPP. 963

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
CIVIL NO. HM-87-1383

LEON NEUFELD - Plaintiff

v.

CITY OF BALTIMORE, et al. - Defendants

MEMORANDUM

In order to receive a wider variety of television stations, the plaintiff, Leon Neufeld, installed a solid, ten-foot-wide, receive-only satellite dish in the front yard of his home in the city of Baltimore, Maryland ("the City"). The following month, Neufeld received notice that his satellite dish violated thenexisting zoning ordinances. Eleven criminal convictions later, Neufeld removed the dish and instituted this suit. Presently before this Court are the motion of the defendants to dismiss and the motion of the plaintiff for partial summary judgment.

I. FACTUAL SUMMARY

On March 31, 1984, Neufeld installed his satellite dish on a pole in the front yard of his home. However, Neufeld failed to obtain a permit from the Board of Municipal and Zoning Appeals ("the Board") for the dish, *see* Baltimore City, Md., Code art. 30, Sect. 4.1c (1983), and also failed to position his dish outside of the required thirty-foot setback for his residential (R-1) area. *See*

id., Section 4.1-2b (requires front and back yard depths of thirty feet). After the city notified him of these violations of the applicable zoning ordinances, Neufeld appealed to the Board and asked the Board for a conditional use permit for the dish. The Board denied that request and upheld the notice of violation. Neufeld appealed again on September 17, 1984, and the Circuit Court for Baltimore City affirmed the Board's decision on March 5, 1985, per Judge Thomas Ward.[1]

On January 23, 1985, apparently in connection with the sale of a cable television franchise to United Cable of Baltimore, the City passed Ordinance 266, which imposed stricter limitations on the placement and size of satellite dishes within the City. In particular, Ordinance 266 requires that satellite dishes must be less than six feet wide whether mounted on buildings or free-standing, as Neufeld's was. *See* Baltimore City, Md., Code art. 30, Section. 4.1-1b.1a, .lb (1985). Under Ordinance 266, other radio and television antennae, not including satellite dishes, could extend as much as twelve feet above the buildings on which they mounted. *Id.* Section 4.1-1. Finally, Ordinance 266 permits some entities, including schools, museums, churches, hotels, and taverns, to erect free-standing satellite dishes up to twelve feet wide. *Id.*, Section 4.1-1c.

On October 8, 1985, the City filed criminal charges against Neufeld for violating the ordinances. Neufeld was convicted and fined $100.00. On appeal of that conviction before the Circuit

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1. Although Judge Ward is a brother-in-law of the undersigned judge, that fact neither affects the impartiality of this Court nor requires recusal. 28 U.S.C., Section 455. Nevertheless, at a conference held in chambers, this Court made the parties aware of the familial relationship. Neither side noted an objection. *See Sierra Club v. Simkins Indus, Inc.*, 847 F.2d 1109, 1116-17 (4th Cir. 1988).

Court for Baltimore City, Neufeld argued that the provisions of Ordinance 266 relating to satellite dishes were preempted by regulations promulgated by the Federal Communications Commission ("FCC"), and alternatively, that the provisions were prohibited by the First and Fourteenth Amendments to the United States Constitution. On September 22, 1986, the circuit court affirmed Neufeld's conviction, per Judge Mary Arabian. Several days later, Neufeld was convicted for ten more violations of the zoning ordinances, per Judge Theodore Oshrine. Finally, Neufeld dismantled the dish and filed this action. In addition to a constitutional attack on the ordinances, Neufeld asserted claims for damages under 42 U.S.C. Section 1983 and 1985 in connection with the prosecutions and the compelled dismantling of his dish.

After the filing of the present motions, this Court raised *sua sponte* the issue of abstention under the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and subsequently dismissed the case on that ground. A panel of the Fourth Circuit reversed that dismissal, *Neufeld v. City of Baltimore*, 964 F.2d 347 (4th Cir. 1992), and remanded the case "for consideration of Neufeld's claim on its merits." *Id.* at 351.

II. MOTION TO DISMISS

Neufeld artues that the remand order indicates that the Fourth Circuit must have considered the arguments presented in the defendants' motion to dismiss and found them wanting. This Court agrees, but justice requires a more detailed explanation, so that the defendants will know exactly where their arguments went off the tracks. Accordingly, before reaching the merits of the plaintiff's motion for partial summary judgment, this Court briefly will address the defendants' motion to dismiss.

Appendix I

A. ***Naming a Proper Party***

In his complaint, Neufeld named the following parties as defendants:

> THE CITY OF BALTIMORE, and THE MAYOR and CITY COUNCIL of the CITY OF BALTIMORE, in their official capacities and their successors in title; City Hall, Baltimore, MD. 21202
>
> and
>
> THE BOARD OF MUNICIPAL AND ZONING APPEALS OF BALTIMORE CITY; 222 E. Saratoga Street Baltimore, Md. 21202
>
> and
>
> ROBERT E. SMITH as Director of the Office of Communication and Cable of the City of Baltimore.

Complaint at 1. The defendants argue that the plaintiff should have named "The Mayor and City Council of Baltimore City" as the defendant with the capacity to sue and be sued, instead of "The City of Baltimore." Clearly, the plaintiff named both entities, and the defendant does not allege failure of notice or any other prejudice resulting from the arguably improper inclusion of the "The City of Baltimore" in the complaint. Therefore, the defendants' hypertechincal pleading defense must fail based on the principle, embodied in Federal Rules of Civil Procedure, that

the purpose of pleading is to facilitate a proper decision on the merits. *See Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).[2]

B. *Res Judicata*

Arguing that the state court decided the issues raised in this case during the 1986 criminal proceedings, the defendants maintain that Neufeld is barred in this case by doctrine of *res judicata*. The doctrine of *res judicata*, or 'claim preclusion,' holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Meekins v. United Transportation Union*, 946 F.2d 1054, 1057 (4th Cir. 1991). The rule promotes judicial efficiency by lending the stamp of finality to claims once litigated. *United States v. Tatum*, 943, F.2d 370, 381 (4th Cir. 1991). However, in this case, the parties to the state criminal proceedings included only Neufeld and the State of Maryland, and the only claim litigated in those proceedings involved Neufeld's guilt of the charged zoning violations. *Res judicata* therefore does not apply to this case. *Meekins*, 946 F.2d at 1057-58.

The defendants might have intended to assert the related doctrine of collateral estoppel, or "issue preclusion," which applies to narrower portions of an action than does *res judicata*. *Tatum*, 943, F.2d at 382. Under that doctrine, the decision of a court on an issue of fact or law necessary to a judgment will preclude relitigation of the same issue in a subsequent action involving one of the parties to the first suit. *Allen*, 449 U.S. at 94.

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2. Although the hypertechnicality of this defense certainly leaves something to be desired, this Court finds no evidence of an improper purpose and so declines the plaintiff's invitation to impose sanctions pursuant to Fed. R. Civ. P. 11.

Thus, under the doctrine of collateral estoppel, an issue necessarily decided in a criminal conviction can have preclusive effect in later civil proceedings. *Moore v. United States*, 300 F.2d 353, 355 (4th Cir. 1966). The defendants bear the burden of proof on the issue of estoppel. *E.g., Dowling v. United States*, 493 U.S. 342, 350 (1990). In this case, the plaintiff denies that any of the state judges ever directly addressed the issues raised in this case, and the defendants have failed to submit any evidence to support their arguments to the contrary. Therefore, the doctrine of collateral estoppel does not bar this case.

C. *Failure to Exhaust Administrative Remedies*

The defendants argue that Neufeld cannot attack the validity of Ordinance 266 or the other amended ordinances because he never sought a variance under the provisions of those ordinances. Of course, in order to maintain his Sect. 1983 action, Neufeld does not have to exhaust his administrative remedies. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

Moreover, with regard to his constitutional attack of the zoning ordinances, Maryland law does not require exhaustion when a plaintiff brings "a direct attack upon the power or authority (including whether it was validly enacted) of the legislative body to adopt the legislation from which relief is sought." *Harbor Island Marina, Inc. v. Board of County Comm'rs*, 286 Md. 303, 308 (1979). In this case, Neufeld maintains that FCC regulations preempt the zoning ordinances; accordingly, he need not seek a variance as a prerequisite to this lawsuit.

Appendix I

III. MOTION FOR PARTIAL SUMMARY JUDGMENT

As noted above, the plaintiff filed a motion for partial summary judgment. Comprehensive in scope, the motion seeks a declaratory judgment that the satellite dish zoning ordinance at issue in this case in unconstitutional, both on its face and as applied to the plaintiff, because (1) it represents (a) a prior restraint, (b) an overbroad restriction, and (c) an unreasonable prohibition of speech-related activity, all in violation of the First and Fourteenth Amendments; (2) it represents arbitrary and discriminatory class legislation in violation of the Equal Protection Clause of the Fourteenth Amendment; and (3) it is preempted by regulations promulgated by the FCC; Neufeld also seeks a declaratory judgment that the defendants deprived him of his rights under the laws and Constitution of the United States, and lastly, that he once again may install his satellite dish in his front yard. Further, the plaintiff requests an injunction (1) enjoining the defendants from enforcing the ordinance; (2) ordering restitution by the defendants of all fines paid by the plaintiff; and (3) ordering the payment of attorneys' fees pursuant to 42 U.S.C. Section 1988. Finally, the plaintiff's motion seeks summary judgment on his claims under 42 U.S.C. Section 1983 on the issue of liability.[3]

A. *Standing*

As noted above, the Fourth Circuit remanded this case for consideration of the plaintiff's claims on their merits. At a

3. Given the scope of the motion, and the absence therein of any mention of the plaintiff's claims under 42 U.S.C. Section 1985, this Court will consider those claims abandoned, especially in light of the absence of any evidence that the defendants participated in the conspiracy. *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985).

hearing on these motions, this Court inquired about the effect on this case of the decision by the Maryland Court of Appeals in *Olsen v. Mayor and City Council of Baltimore,* 321 Md. 324 (1990). In that case, the plaintiff, Samuel R. Olsen, sought approval to maintain a ten-foot-wide satellite dish on the roof of his home in the Federal Hill neighborhood of the City. Olsen proved at trial that the surrounding buildings prevented him from locating his dish anywhere but on the roof, and that an eight-to-ten-foot-wide antenna was necessary for adequate reception; also at trial, Olsen's neighbors testified in opposition to his plan to install the dish antenna.

Finding that the dish violated both the City's satellite dish zoning ordinance (at issue in the case at bar) as well as an urban renewal ordinance that prohibited all rooftop installations that could be seen from the street, the Board denied the request. On appeal, Olsen argued that Section 25.104 preempted the satellite dish zoning ordinance. However, noting that Olsen's antenna also violated the independent urban renewal ordinance, the Court of Appeals declined to decide the preemption issue and affirmed the decision of the Board. *Olsen,* 321 Md. at 331-32.

In this case, Neufeld has presented unrebutted evidence that the high cost of clearing trees from his and neighboring property prevented him from locating his dish anywhere but in his front yard, and that a ten-foot-wide antenna was necessary for adequate reception. Also, Neufeld's dish antenna violated the independent setback ordinance prohibiting all installations in front of the home within thirty feet of the lot line. Baltimore City, Md., Code art. 30, Section 4.1-2b (1983). Based on the reasoning in *Olsen,* this Court concludes that Neufeld lacks standing to challenge his convictions under the satellite dish zoning ordinance, because his satellite dish independently violated the

setback ordinance. Therefore, this Court will deny the motion of the plaintiff for partial summary judgment (1) on the request for a declaratory judgment (a) that the satellite dish zoning ordinance at issue was unconstitutional on any ground as applied to him, (b) that the defendants deprived him of his rights under the laws and Constitution of the United States, and (c) that he may install his satellite dish in his front yard; (2) on his request for an injunction ordering restitution by the defendants of all fines paid by him; and (3) on his request for summary judgment on his claims under 42 U.S.C. Section 1983 on the issue of liability.

In sum, whether or not the satellite dish antenna zoning ordinance, before or after amendment in January 1985, validly applied to the satellite dish in the plaintiff's front yard makes no difference. Neufeld's antenna violated the setback ordinance, Section 4.1-2b, and therefore the Board could require Neufeld to dismantle it without depriving him of any of his civil rights. Of course, in the absence of liability under Section 1983, this Court may not award attorneys' fees under Section 1988. *See Hanrahan v. Hampton*, 446 U.S. 754, 756 (1980) ("[t]he statute . . . permits the award of attorneys' fees only to a 'prevailing party' ").

B. ***Constitutional Challenge***

In light of the foregoing, the only claim remaining to be considered is the plaintiff's challenge that the satellite dish zoning ordinance (Ordinance 266) is unconstitutional on its face. Neufeld has standing to bring this claim in light of the fact, reflected in the record, that he *could* put his ten-footwide satellite dish antenna elsewhere on his property after clearing some of the trees on his and neighboring property, but for the threat of

prosecution under Ordinance 266.[4] Because Ordinance 266 prevents Neufeld from installing his satellite dish anywhere on his property, the plaintiff may bring this challenge to the constitutionality of the zoning ordinance.

On that issue, simply stated, "the Baltimore City Zoning Code relating to the use of satellite receive-only antennas is preempted by the FCC regulation [Section 25.104]." *Olsen*, 321 Md. at 334 (Eldridge, J. concurring). In the Communications Satellite Act of 1962, Congress conferred authority on the FCC to regulate in the area of satellite communications, 47 U.S.C. Section 721, and there is no question about the power of the FCC to preempt local regulations. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-700 (1984).

The FCC regulation relevant to this case provides:

> State and local zoning or other regulations that
>
> differentiate between satellite receive only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of

---

4. Apparently, the plaintiff hoped to avoid the costs of such and landscaping project.

> satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation costs of the equipment.

47 C.F.R. Section 25.104 (1986). Ordinance 266 differentiates between satellite dish antennas and other types of radio and television antennas. Further, leaving aside the issue of whether Ordinance 266 contains "a reasonable and clearly defined health, safety or aesthetic objective" the evidence in this record shows that one needs an eight-to-twelve-foot wide satellite dish antenna for adequate reception; because Ordinance 266 permits satellite dish antennas mounted on buildings in residential (R-1) districts only between four and six feet in diameter and projecting no more than six to eight feet from the buildings on which they are mounted, and permits fee-standing satellite dish antennas only when less than six feet in diameter and when less than ten feet in height, *see* Baltimore City, Md. Code art. 30, Section 4.1-1b, Ordinance 266 clearly imposes an unreasonable limitation on the reception of satellite delivered signals.[5]

III. CONCLUSION

This Court will deny the defendants' motion to dismiss, and will grant in part and deny in part the plaintiff's motion for partial summary judgment. As noted above, the holding of the Maryland Court of Appeals in *Olsen v. Mayor and City Council of Baltimore*, 321 Md. 324 (1990), precludes Neufeld's claims in connection with his criminal convictions and the dismantling of

---

5. In contrast, Section 25.104 does not preempt the setback ordinance in this case. That ordinance applies equally to all antennas, whether of the satellite dish or some other variety.

his satellite dish. Because the satellite dish antenna, as installed, violated the facially neutral and constitutionally unassailable setback ordinance, the Board had authority to order the plaintiff to remove it.

Finally, as discussed above in greater detail, the plaintiff successfully has challenged Ordinance 266. 47 C.F.R. Section 25.104 preempts the Baltimore City Zoning Code as it relates to the use of satellite dishes in residential areas. Accordingly, this Court will grant the plaintiff's motion to the extent that it seeks a declaratory judgment that Ordinance 266 is preempted and an injunction enjoining the enforcement of that ordinance in the future. This Court will execute an Order on this date in accordance with the foregoing Memorandum.

Herbert F. Murray
Senior United States District Judge

Dated: January 29, 1993.

APPENDIX J — MEMORANDUM DECISION OF THE BOARD OF MUNICIPAL AND ZONING APPEALS FOR BALTIMORE CITY DENYING PETITIONER'S REQUEST TO GRANT AND THE ISSUANCE OF A PERMIT IN THE FORM OF EITHER A "SPECIAL EXCEPTION" OR A "CONDITIONAL USE" AS AUTHORIZED BY THE ZONING CODE TO PERMIT THE SATELLITE ANTENNA AT ITS REQUIRED LOCATION – FILED AUGUST 20, 1984

GILBERT V. RUBIN
EXECUTIVE DIRECTOR
THIS IS NOT A PERMIT

BOARD OF MUNICIPAL AND ZONING APPEALS

7th FLOOR — MUNICIPAL BUILDING ANNEX

222 E. SARATOGA STREET

BALTIMORE, MARYLAND 21202

DO NOT START WORK
OR USE THE PROPERTY
IF THIS APPLICATION
IS APPROVED UNTIL
YOU GET A PERMIT OR
CERTIFICATE OF
OCCUPANCY FROM THE
DEPARTMENT OF HOUSING
AND COMMUNITY
DEVELOPMENT

AUG 20 1984

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At a meeting of the Board of Municipal and Zoning Appeals on *Tuesday, August 14, 1984* the following resolution was passed:

"Resolved, that in the matter of Appeal No. *355-84X Leon Neufeld P.O. Box 57, Stevenson, MD 21153* Appellant, to permit *the retention of an existing satellite dish antenna, ten feet in diameter at 2403 Cross Country Boulevard* the BOARD OF MUNICIPAL AND ZONING APPEALS, after giving public notice, inspecting the premises, holding a public hearing, considering all data submitted, and by authority of Ordinance No. 1051, approved April 20, 1971, known as the Zoning Ordinance, made a study of the premises and neighborhood and finds that the property is on the southeast side of Cross Country Boulevard, 120 feet 10-1/4 inches southwest of Dale Road, in an R-1 Zoning District.

"The premises is improved by a two story, frame, single family dwelling, 28 feet by 28 feet. It is proposed to retain an existing free standing, satellite receiving dish antenna, ten feet in diameter, in the front yard.

"Prior to April 20, 1971, the date of passage of the New Comprehensive Zoning Ordinance No. 1051, the property was zoned Residential Use, F-40 & F-1-1/2 Height and Area District.

"Under the provisions of Section 4.1-1c, accessory radio and television antennas, when free standing or when they extend higher than twelve feet above the building on which they are mounted are listed as a conditional use in the R-1 District.

"The Board may authorize a conditional use subject to the requirements and provisions of Sections 11.0-3b-1 and 11.03c.

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"Under the Bulk Regulations of Section 4.1-2b, a front yard setback 30 feet in depth is required. The existing free standing antenna is located in the required front yard.

"The Board may authorize a yard or setback less than a yard or setback required by the applicable regulations under Section 11.0-e-2(c).

"Under the provisions of Section 2.0-8m, except for specified projections and obstructions listed, every part of a required yard or other required open space shall be open and unobstructed to the sky. Satellite dish antennas are not specifically permitted to project into the front yard.

"Under the provisions of Section 13.0-2, a structure is defined as anything erected, the use of which has fixed location on the land, including but not limited to buildings, fences, walls, signs and towers.

"The testimony shows that this appeal presents a request for authorization to retain a free standing antenna ten feet in diameter in the required front yard, in the R-1 Residence District. The testimony reveals that the owner built this property approximately five or six years ago at a cost of $34,000. It is a single family house. On March 24, 1984, the satellite dish was erected. It is ten feet in diameter mounted on a pole either nine or fifteen feet high. The appellant stated that the satellite dish does not constitute a menace to the public health and safety, that its purpose is to obtain approximately 100 cable television stations. The dish was installed by the owner.

"The Board, on the other hand, acknowledges receipt of letters from the Northwest Baltimore Corporation, the Cross

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Country Improvement Association and the Mount Washington Improvement Association, dated August 10, 1984 and July 26, 1984, going on the record as supporting the residents opposition to the continued use and storage of a large satellite dish, which is out of scale for its location. The neighborhood groups advise that they have received numerous complaints about the intrusiveness of this structure and believe that it is detrimental to the area.

"A witness testified at the public hearing that this is a large, massive, dish on a nine/fifteen foot pole which is unsightly, and they are all opposed to the satellite dish remaining.

"The Board also acknowledges receipt of a letter from the Planning Commission, dated July 3, 1984, stating that the approximately half-an-acre, subject site is near the intersection of Cross Country Boulevard and Dale Road, improved with a detached, single family dwelling. The immediate neighborhood consists of single family houses on large lots. They feel strongly that the application should be disapproved, and the size of this antenna is inappropriate.

"A letter from the Neighborhood Progress Administration, dated May 21, 1984, states that they feel that the satellite dish antenna on the front lawn is detrimental and provides a negative influence on the residential character of the neighborhood and recommends that this application be denied.

"The Health Department recommends that adequate safeguards shall be provided to protect the public from exposure, etc., from microwave or radio frequency transmission or carrier sources, and the Fire Department has no objection to this appeal.

"The Board, after having given due regard and

consideration to the nature and condition of all the adjacent uses and structures and the facts in this case, is of the opinion that the proposal does not meet the Standards for Conditional Uses for an antenna and also violates the provisions of Section 2.0-8m, with regard to projections into the required yards. The Board feels that the antenna is unsightly and too large and should not be allowed.

"With due consideration to the guides and standards set forth in Sections 11.0-5a and 11.0-5c of the Zoning Ordinance and to the reports of the several City Departments as required by the Zoning Ordinance, the Board finds that the proposed dish antenna would menace and endanger the public health, security, and general welfare.

"In accordance with the above facts and findings, the Board disapproves the application."

EXECUTIVE DIRECTOR

APPENDIX K — FEDERAL COMMUNICATIONS COMMISSION RULE MAKING FILED FEBRUARY 14, 1986 PUBLISHED AS 47 C.F.R. § 25.104 (PARTIAL PREEMPTION)

47 CFR Ch. 1 (10-1-87 Edition)

PART 25-SATELLITE COMMUNICATIONS

§§ 25.104 Preemption of local zoning of earth stations.

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:

(a) Have a reasonable and clearly defined health, safety, or aesthetic objective; and

(b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.

[51 FR 5526, Feb. 14, 1986]

APPENDIX L — RELEVANT PORTION OF FEDERAL COMMUNICATIONS COMMISSION SUBSEQUENT ORDER DENYING NATIONAL ASSOCIATION OF BROADCASTERS PETITION TO ALTER PRIOR F.C.C. RULE, PUBLISHED AS 47 C.F.R. § 25.104, TO ELIMINATE NUMICIPALITIES RIGHT TO ANY DIFFERENTIATION BY TOTAL PREEMPTION DOCKETED ON DD DOCKET NO. 85-87. FOLLOWING EXCERPT IS PARAGRAPH NO. 21, F.C.C. ORDER 86-598 ENTERED DECEMBER 29, 1987 DENYING TOTAL PREEMPTION

> "21. *We emphasize, however, that when an ordinance does discriminate, a community bears a heavy burden to justify its actions.* Not only must such a law have a valid health, safety and aesthetic basis but *it also must not operate to preclude* or unreasonably limit *reception or impose unreasonable costs* on users. SPACE contends that some communities are ignoring the second portion of this rule and are enacting satellite antenna bans by merely asserting a valid aesthetic objective for their legislation. Such local action is not valid under our preemption rule. *Communities are on notice that if they choose to treat satellite antennas in a manner different from other antennas they must comply with both (a) and (b) of our rule.* Failure to conform to only one of these conditions will result in preemption of the regulation. *Thus aesthetics alone are insufficient to justify a discriminatory ordinance that operates as a ban* or an unreasonable limitation on satellite antenna construction."

(Emphasis added).

APPENDIX M — RELEVANT PORTIONS OF ARTICLE 30, BALTIMORE CITY ZONING CODE IN FORCE DURING ADMINISTRATIVE HEARING PRIOR TO AMENDMENT BY ORDINANCE NO. 266

Article 30

1.02 Intent and Purpose

This ordinance is intended to serve the following purposes to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to faciliate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements; to conserve the value of buildings and other structures; to encourage the most appropriate use of land throughout the City; and to divide the City into zoning districts of such character, number, shape, and area as are best suited to effect the foregoing purposes.

. . .

2.0-8 Bulk Regulations

Permitted Protections and Obstructions into Required Yards. Except for the specified projections and obstructions listed below, every part of a required yard or other required open space shall be open and unobstructed to the sky. Unless otherwise noted, distance of projections shall be measured on a horizontal plane from the wall of the structure to which such projections are attached.

yards adjoining streets ..... F

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. . .

Chapter 4- Residence Districts

Ten Resident Districts, each designed for a specific purpose and function, are provided to meet the housing needs of the City's present, and future population and *to promote the stability and desirability of residential areas.* Both Single Family and General Residence Districts are provided, with the General Residence Districts allowing a broad range of housing types. These districts also include community facilities and open land uses, as listed, which serve the residents and are customarily located in residential neighborhoods.

Use Regulations4.0-1

(a) Permitted uses are as set forth under each district in Part B of this chapter. Unless otherwise specifically set forth, wherever a permitted use is named as a major category under Part B of this chapter, it shall be deemed to include all and only those itemized uses listed under the said category in the applicable Residence District.

(b) Conditional uses, as set forth under each district in Part B of this chapter, may be authorized-subject to the provisions of this ordinance. unless otherwise specifically set forth, wherever *a conditional use is named as a major category under Part B* of this chapter, it

shall *be deemed to include all and only those itemized* uses listed under the said category in the applicable Residence District.

Bulk Regulations40-2

As follows, and as set forth under each district in Part B of this chapter.

(b) Yards

(d) Bulk regulations applicable to certain conditional uses. Wherever bulk regulations for a conditional use are set forth in Part B of this chapter as being required by the Board, the Board shall be guided by the standards of Section 11.0-5a of this ordinance.

R-1Chapter 4 - Residence Districts4.1.1

(a) Permitted uses

1. Single-family detached dwellings

2. Non-profit or publicly owned educational and cultural institutions, as follows:

(a) Elementary schools

(b) Junior and senior high schools

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(c) Junior colleges, college, and universities-but not including business colleges or trade schools

. . .

3. Religious institutions, as follows:

(a) Churches, temples and synagogues

(b) Convents, seminaries and monasteries

b. Accessory uses. Accessory uses and structures incidental to and on the same lot as a principal use including, but not limited to, the following:

1. Accessory radio and television antennas when less than 12 feet above the building on which they are mounted.

c. Conditional uses. The following uses as conditional uses, subject to the requirements and provisions of Section 11.0-3c of this ordinance.

(1) Accessory radio and television antennas when free standing or when they extend higher than 12 feet above the building on which they are mounted.

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6. Governmental services, as follows:

(a) Fire and police stations

. . .

10. Public utility uses as follows:

(a) Antenna towers and micro-wave relay towers and installation for communications transmission or receiving.

(b) Repeater, transformer, pumping, booster, switching, conditioning, regulating stations, and other similar installations.

(c) Telephone exchanges

14. Accessory uses incidental to and on the same lot as the above conditional uses.

Bulk Regulations 4.1-2

b. Yards

(1) Permitted uses. For each principal permitted use, and a front yard, two side yards, and a rear yard shall be provided, each of which shall be not less than the following amounts.

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Single-family detached dwellings, Front 30 ft., Interior Side 10 Ft., Street Corder Side 20 ft., Rear 30 ft.

. . .

3. Conditional uses. *Except as set forth below,* principal conditional uses shall comply with the yard requirements of single-family detached dwellings:

Chapter 11

Administration and Enforcement

Sect. 11.0-1 Organization

The administration of this ordinance is hereby noted in the following offices of the government of Baltimore City:

. . .

The Board of Municipal and Zoning Appeals

. . .

. . .

The Board of Municipal and Zoning Appeals11.0-3

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a. Identification. The word "Board" when used in this ordinance shall mean the Board of Municipal and Zoning Appeals as established by Sections 87 through 100 of Article 7 of the Chapter of Baltimore City (1964 revision), as amended.

b. Jurisdiction. The Board shall have the following jurisdiction and authority:

(1) to hear and decide application for conditional uses in the manner prescribed by and subject to the standards established herein.

(2) to hear and decide applications for special exceptions from the terms provided in this ordinance in the manner prescribed by and subject to the standards established herein.

Standards 11.0-5

a. Standards for conditional uses. No conditional use shall be authorized unless the Bard finds in each specific case that the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public

health, security, general welfare, or morals, and, as a further guide to their decision upon the facts of each case, *they shall give consideration to the following, where appropriate:*

(1) the nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures;

(2) the resulting traffic patterns and adequacy of proposed off-street parking and loading;

(3) the nature of the surrounding area and the extent to which the proposed use might impair its present and future development;

(4) the proximity of dwellings, churches, schools, public structures, and other places of public gathering;

(5) accessibility of the premises for fire and police protection;

(6) accessibility of light and air to the premises and to the property in the vicinity;

(7) the type and location of

adequate utilities access roads, drainage, and other necessary facilities that have been or will be provided;

(8) the preservation of cultural and historic landmarks;

(9) any Urban Renewal Plan approved by the Mayor and City Council of the Master Plan for the City approved by the Planning Commission;

(10) all standards and requirements contained in this ordinance;

(11) the intent and purpose of this ordinance as set forth in Chapter 1; and

(12) any other matters considered to be in the interest of the general welfare.

b. Standards for special exceptions. The Board shall not authorize special exceptions from the regulations of this ordinance, as authorized in Section 11.03d3 of this chapter, unless it shall make findings based upon the evidence presented to it in each specific case that:

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(1) because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, a partial difficulty to the owner would result, as distinguished from a mere inconvenience, if the strict letter of the regulations were to be carried out;

(2) the conditions upon which an application for a special exception is based are unique to the property for which the special exception is sough and are not applicable, generally, to other property within the same zoning classification;

(3) the practical difficulty is caused by this ordinance and has not been created by intentional action of any person presently having an interest in the property;

(4) the granting of the special exception will not be detrimental to or endanger the public health, security, general welfare, or morals;

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(5) the purpose of the special exception is not based exclusively upon a desire to increase the value or income potential of the property;

(6) the special exception is not be injurious to the use and nor substantially diminish and impair property values in the neighborhood;

(7) the granting of the special exception will not impair an adequate supply of light and air to adjacent property, or vercrowded the land, or create an undue concentration of population, or substantially increase the congestion of the streets, or create hazardous traffic conditions, or increase the danger of fire, or otherwise endanger the public safety;

(8) the special exception will not adversely affect transportation or unduly burden water, sewer, school, park, or other public facilities;

(9) the granting of the special exception will not adversely

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affect any Urban Renewal Plan approved by the Mayor and City Council or the Master Plan for the City approved by the Planning Commission; and

(10) within the intent and purposes of this ordinance, the special exception, if granted, is the minimum exception necessary to afford relief. (To this end, the Board may permit a lesser exception than that applied for.)

APPENDIX N — ORDINANCE NO. 266 AMENDING BALTIMORE CITY ZONING CODE SPECIFICALLY REGULATING THE SIZE SHAPE, MATERIALS OF CONSTRUCTION AND PLACEMENT OF SATELLITE ANTENNAES IN THE CITY.
ENACTED JANUARY 23, 1985

RE-ENROLLED
BILL NO. 164

ORDINANCE NO. 266

AN ORDINANCE concerning ZONING-MICROWAVE ANTENNAS (SATELLITE DISHES) FOR the purpose of requiring satellite dishes which are larger than three FOUR feet in diameter or which extend more than 6 feet from a building or which are free standing AND MORE THAN 10 FEET IN HEIGHT be authorized by the Board of Municipal and Zoning Appeals AUTHORIZATION BY THE BOARD OF MUNICIPAL AND ZONING APPEALS OF: (1) MOUNTED SOLID DISHES OVER 4 FEET IN DIAMETER OR PROJECTING OUT MORE THAN 6 FEET, (2) MOUNTED MESH DISHES OVER 6 FEET IN DIAMETER OR PROJECTING OUT MORE THAN 8 FEET, (3) DISHES MOUNTED ON THE FRONT HALF OF A ROOF, AND (4) FREE-STANDING DISHES OVER 6 FEET IN DIAMETER, MORE THAN 10 FEET HIGH OR CONSTRUCTED OF SOLID MATERIAL; in all Residence Districts, the O-R District and the B-1 and B-2 Districts and EXEMPTING THE SATELLITE DISHES OF TAVERNS; PERMITTING 12-FOOT DIAMETER DISHES FOR CERTAIN USES WHICH OCCUPY A LOT OF NOT LESS THAN 7,500 SQUARE FEET AND FOR TAVERNS; adding standards for the Board to consider in the authorization of such uses AND PERMITTING SATELLITE DISHES IN SIDE AND REAR YARDS; AND GENERALLY RELATING TO SATELLITE DISHES.

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BY repealing and reordaining with amendments Article 30-Zoning Sections 4.1-1b-1, 4.1-1e-1, 5.1-1b-1, 5.1-1e-1, 6.1-1b-39, 6.1-1e-1, 7.1-1b-117, 7.2-1b-81 Baltimore City Code (1983 Replacement Volume, as amended)

BY adding Article 30-Zoning Sections 2.0-8M-14A, 4.1-1b-1a, 4.1-1B-1B, 4.1-1B-1C, 4.1-1e-1b, 5.1-1b-1a, 5.1-1B-1B, 5.1-1B-1C, 5.1-1e-1a, 6.1-1b-39a, 6.1-1B-39B, 6.1-1B-39C, 6.1-1e-1a, 6.3-1b-72, 6.4-1b-23, 11.0-5a-14 Baltimore City Code (1983 Replacement Volume, as amended)

SECTION 1. Be it ordained by the Mayor and City Council of Baltimore, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended, to read as follows:

EXPLANATION: Italics indicate new matter added to existing law.
[Brackets] indicate matter stricken from existing law.
CAPITALS indicate amendments to bill.
Strike out indicates matter stricken out of bill.

Article 30-ZONING

CHAPTER 2-GENERAL PROVISIONS

2.0-8 BULK REGULATIONS.

M. PERMITTED PROJECTIONS AND OBSTRUCTIONS INTO REQUIRED YARDS.

14A. MICROWAVE ANTENNAS (SATELLITE DISHES) . . . S R NOT LESS THAN 5 FEET FROM ANY LOT

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LINE AND NOT LESS THAN 10 FEET FROM THE NEAREST DOOR OR WINDOW OF A PRINCIPAL USE. ..... R.

Chapter 4-Residence Districts

4.1 R-1 Single Family Residence District.

1b. Accessory uses.

1. Accessory radio and television antennas, but not including microwave-antennas (satellite dishes), when less than 12 feet above the building on which they are mounted.

1a. Accessory microwave antennas (satellite dishes) when 3-4 feet or less in diameter and projecting less than 6 feet from the building on which they are mounted. IF MOUNTED, PROJECTING LESS THAN 6 FEET FROM THE BUILDING ON WHICH THEY ARE MOUNTED OR, IF FREE STANDING, LESS THAN 10 FEET IN HEIGHT.

1B. ACCESSORY MICROWAVE ANTENNAS (SATELLITE DISHES) WHEN 4 FEET OR MORE IN DIAMETER AND LOCATED ON THE PREMISES OF A TAVERN.

1A. ACCESSORY MOUNTED MICROWAVE ANTENNAS (SATELLITE DISHES) WHEN 4 FEET OR LESS IN DIAMETER IF CONSTRUCTED OF SOLID MATERIAL AND PROJECTING 6 FEET OR LESS FROM THE BUILDING ON WHICH THEY ARE MOUNTED OR 6 FEET OR LESS IN DIAMETER IF CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN AND PROJECTING

8 FEET OR LESS FROM THE BUILDING ON WHICH THEY ARE MOUNTED; AND PROVIDED THAT THE DISH IS ATTACHED TO THE REAR HALF OF THE ROOF OF THE PRINCIPAL BUILDING AT LEAST 5 FEET BEYOND THE CENTER LINE OF THE ROOF.

1B. ACCESSORY FREE STANDING MICROWAVE ANTENNAS (SATELLITE DISHES) MOUNTED ON A SINGLE STANCHION WHEN 6 FEET OR LESS IN DIAMETER AND LESS THAN 10 FEET IN HEIGHT AND CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN.

1C. ACCESSORY MICROWAVE ANTENNAS (SATELLITE DISHES) NOT EXCEEDING 12 FEET IN DIAMETER AND LOCATED ON THE PREMISES OF THE FOLLOWING NON-PROFIT OR PUBLICLY OWNED INSTITUTIONS: ELEMENTARY SCHOOLS, JUNIOR AND SENIOR HIGH SCHOOLS, JUNIOR COLLEGES, COLLEGES, UNIVERSITIES, LIBRARIES, ART GALLERIES, MUSEUMS, AQUARIUMS, PLANETARIUMS, CHURCHES, TEMPLES, SYNAGOGUES, CONVENTS, SEMINARIES, MONASTERIES, AND MEDICAL FACILITIES; OR WHEN LOCATED ON THE PREMISES OF A HOTEL, MOTEL, VFW POST, AMERICAN LEGION POST, HOUSING FOR THE ELDERLY OR NURSING HOME; PROVIDED THAT THE INSTITUTION OR USE IS LOCATED ON A LOT OF NOT LESS THAN 7,500 SQUARE FEET; AND LOCATED ON THE PREMISES OF A TAVERN REGARDLESS OF LOT SIZE.

1c. Conditional uses.

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1. Accessory radio and television antennas, but not including microwave antennas (satellite dishes), when free standing or when they extend higher than 12 feet above the building on which they are mounted.

1b. Accessory microwave antennas, (satellite dishes) when free standing AND MORE THAN 10 FEET IN HEIGHT or when over 3-4 feet in diameter or when they project more than 6 feet from the building on which they are mounted.

1B. ACCESSORY MICROWAVE ANTENNAS (SATELLITE DISHES)

(A) MOUNTED SATELLITE DISH CONSTRUCTED OF SOLID MATERIAL OVER 4 FEET IN DIAMETER, OR A DISH CONSTRUCTED OF SOLID MATERIAL PROJECTING MORE THAN 6 FEET FROM THE BUILDING.

1A. ACCESSORY MOUNTED MICROWAVE ANTENNAS (SATELLITE DISHES) WHEN 4 FEET OR LESS IN DIAMETER IF CONSTRUCTED OF SOLID MATERIAL AND PROJECTING 6 FEET OR LESS FROM THE BUILDING ON WHICH THEY ARE MOUNTED OR 6 FEET OR LESS IN DIAMETER IF CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN AND PROJECTING 8 FEET OR LESS FROM THE BUILDING ON WHICH THEY ARE MOUNTED; AND PROVIDED THAT THE DISH IS ATTACHED TO THE REAR HALF OF THE ROOF OF THE PRINCIPAL BUILDING AT LEAST 5 FEET BEYOND THE CENTER LINE OF THE ROOF.

1B. ACCESSORY FREE STANDING MICROWAVE ANTENNAS (SATELLITE DISHES) MOUNTED ON A

SINGLE STANCHION WHEN 6 FEET OR LESS IN DIAMETER AND LESS THAN 10 FEET IN HEIGHT SCREEN.

1C. ACCESSORY MICROWAVE ANTENNAS (SATELLITE DISHES) NOT EXCEEDING 12 FEET IN DIAMETER AND LOCATED ON THE PREMISES OF THE FOLLOWING NON-PROFIT OR PUBLICLY OWNED INSTITUTIONS: ELEMENTARY SCHOOLS, JUNIOR AND SENIOR HIGH SCHOOLS, JUNIOR COLLEGES, COLLEGES, UNIVERSITIES, LIBRARIES, ART GALLERIES, MUSEUMS, AQUARIUMS, PLANETARIUMS, CHURCHES, TEMPLES, SYNAGOGUES, CONVENTS,

(B) MOUNTED SATELLITE DISH CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN OVER 6 FEET IN DIAMETER, OR A DISH CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN PROJECTING MORE THAN 8 FEET FROM THE BUILDING.

(C) MOUNTED SATELLITE DISH ON THE FRONT HALF OF THE ROOF OF THE PRINCIPAL BUILDING, OR ON THE REAR HALF OF THE ROOF LESS THAN 5 FEET BEYOND THE CENTER LINE.

(D) FREE STANDING SATELLITE DISH MORE THAN 6 FEET IN DIAMETER, OR MORE THAN 10 FEET IN HEIGHT, OR NOT CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN.

1c. Conditional uses.

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1. Accessory or non-accessory radio and television antennas, but not including microwave antennas (satellite dishes), and towers when free standing or when they extend higher than 25 feet above the building on which they are mounted.

1a. Accessory microwave antennas (satellite dishes) when free standing AND MORE THAN 10 FEET IN HEIGHT or when over 3-4 feet in diameter or when they project more than 6 feet from the building on which they are mounted.

1A. ACCESSORY MICROWAVE ANTENNAS (SATELLITE DISHES)

(A) MOUNTED SATELLITE DISH CONSTRUCTED OF SOLID MATERIAL OVER 4 FEET IN DIAMETER, OR A DISH CONSTRUCTED OF SOLID MATERIAL PROJECTING MORE THAN 6 FEET FROM THE BUILDING.

(B) MOUNTED SATELLITE DISH CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN OVER 6 FEET IN DIAMETER, OR A DISH CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN PROJECTING MORE THAN 8 FEET FROM THE BUILDING.

(C) MOUNTED SATELLITE DISH ON THE FRONT HALF OF THE ROOF OF THE PRINCIPAL BUILDING, OR ON THE REAR HALF OF THE ROOF LESS THAN 5 FEET BEYOND THE CENTER LINE.

(D) FREE STANDING SATELLITE DISH MORE THAN 6 FEET IN DIAMETER, OR MORE THAN 10 FEET IN

Appendix N

HEIGHT, OR NOT CONSTRUCTED OF EXPANDED ALUMINUM MESH OR WIRE SCREEN.

Chapter 11-Administration and Enforcement 11.0-5 Standards.

a. Standards for conditional uses.

14. In the case of the placement or erection of microwave antennas (satellite dishes), the Board MAY CONSIDER THE QUALITY OF SIGNAL RECEPTION BUT must find that the antenna will not interfere with the rights of the adjacent and neighboring properties to light, air and sun. In addition, the Board may specify the placement of the antenna and require screening.

APPENDIX O — RELEVANT CONSTITUTIONAL PROVISIONS

Constitution of the United States

[Amendment I]

[Freedom of Religion, of Speech, and the Press]

Congress shall make no law respecting an establsihment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press.

. . .

[Amendment XIV]

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person witin its jurisdiction the equal protection of the laws.